Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAPLE PROPERTIES,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

(BETTY H. HARRIS, JOANN RUDEN, AND ERWIN OKUN,

Real Parties in Interest.)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner Maple Properties ("Maple") requests that a writ of certiorari issue to review the opinion and orders of the Supreme Court of the State of California entered in this case.

QUESTIONS PRESENTED.

In this case, the California Supreme Court considered the sufficiency of the allegations in four causes of action of Maple's First Amended Complaint.* In its opinion dated June 15, 1981, the California Supreme Court ordered Respondent Superior Court of Los Angeles County to sustain demurrers of Real Parties in Interest Betty H. Harris ("Harris"), Joann Ruden ("Ruden"), and Erwin Okun ("Okun") (collectively, the "defendants") to the second, third, and fifth causes of action of the First Amended Complaint without leave to amend, and to sustain demurrers to the sixth cause of action of the First Amended Complaint with leave to amend.

In making this ruling, the California Supreme Court considered the actionable nature of three alleged conspiratorial calculated lies ("the three writings") which were published in a municipal proposition campaign. The California Supreme Court, according determinative weight to a First Amendment interest in free speech in such a context, concluded that Maple's innuendo allegations were not supported by the three writings' words, that the implications of the statements deprecatory to Maple were, as mere opinions, not libelous, and that the sharp attacks on character contained in the three writings, including a charge of conflict of interest, were within the bounds of protected political debate.

*Maple's First Amended Complaint appears as Appendix F to this petition. The Appendices are separately bound in a companion volume cited as "Pet. App."

The questions presented are as follows:

1. Whether the California Supreme Court, in applying an unprecedented strict construction to find the alleged innuendo not to be supported by the words of the three writings, finding the implications of the three writings deprecatory to Maple to be opinion, not libelous, and holding the sharp attacks on Maple's character in the three writings, including the charge of participating in a conflict of interest, to be within the bounds of protected debate, improperly balanced the constitutional interest in free speech advanced by protection of calculated lies in political campaigns against the constitutional interest in the right of personhood (reputation and privacy), as well as the rights to petition government and vote and the interest in an orderly democratic government under law, thereby depriving Maple of due process of law and equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution.

2. Whether the California Supreme Court, in looking to the circumstances surrounding the three writings, as set forth in the First Amended Complaint, in order to find the three writings to be nonactionable opinion and not susceptible of a defamatory meaning and by refusing Maple leave to amend the First Amended Complaint to add additional relevant and material surrounding circumstances, denied Maple due process of law guaranteed to it by the Fourteenth Amendment to the Constitution.

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OPINION BELOW

The June 15, 1981 opinion of the Supreme Court of the State of California, officially cited as 29 Cal.3d 442 and unofficially cited as 175 Cal.Rptr. 157 and 629 P.2d 1369, appears as Appendix A to this petition.[1]

JURISDICTION

The opinion of the Supreme Court of the State of California was filed June 15, 1981. Maple's timely petition for rehearing was denied on July 15, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment, United States Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1]The California Supreme Court's subsequent order denying all petitions for rehearing appears as Appendix E.

STATEMENT OF FACTS.

A. Background Of This Case.

For purposes of considering the sufficiency of the First Amended Complaint, the following allegations in it must be assumed to be true:

This lawsuit concerns an area of Beverly Hills (the "City") known as the Industrial Zone. Maple is a limited partnership chiefly composed of alien Iranians which owns, and desires to develop, property in the Industrial Zone. Maple wanted to build condominiums on its property. On November 28, 1978, the Beverly Hills City Council adopted an ordinance to alter the zoning of the Industrial Zone, thereby enabling Maple to construct condominiums on its property.

Defendants Harris, Ruden, and Okun are residents of the City who hate Maple's partners because they are Iranians. Defendants opposed any development by Maple of its property, as condominiums or otherwise. After the City amended the zoning ordinance to allow the construction of condominiums, defendants conspired to prevent Maple from developing its property. As part of this conspiracy, defendants agreed to circulate petitions in order to place on the City ballot a ballot measure, Proposition B, to challenge the zoning. Defendants further agreed to defeat the zoning in the City election by falsely charging, among other things, that Maple had bribed the City Council in order to obtain the favorable zoning.

Defendants circulated petitions, filed them with the City Clerk, and caused the City Council to put the new zoning to a vote of the City's electorate. Some of the conspirators made the charges of bribery of a Councilman Richard Stone, who had at one time represented Maple and one of its limited partners, in slanderous statements that were circulated throughout Beverly

Hills. Defendants made similar charges in letters published in the *Los Angeles Times* ("*Times* Letter") and the *Beverly Hills Courier* ("*Courier* Letter") and in the official Ballot Argument mailed to all of the City's voters.[2]

The defamatory campaign grievously injured Maple's reputation, caused the City's electorate to reject the zoning, and caused Maple additional damages. Maple now seeks general and special damages in a total amount of $62,555,000 and punitive damages in an amount of $1,000,000.

B. The Proceedings Below.

On September 28, 1979, Maple initiated this lawsuit in the Respondent Superior Court of Los Angeles County by filing its complaint against defendants for libel, slander, conspiracy to commit libel and slander, deprivation of equal protection of the law, conspiracy to deprive equal protection of the law, interference with a prospective economic advantage, and conspiracy to interfere with a prospective economic advantage. Before defendants responded to the complaint, Maple filed its First Amended Complaint,

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[2]Those publications are the three writings which form the basis of the three libel causes of action in the First Amended Complaint.

In its petition for rehearing to the California Supreme Court, Maple sought to add to its First Amended Complaint the allegations that defendants, pursuant to this conspiracy, intentionally damaged Maple's reputation by (a) making criminal accusations to the FBI, District Attorney's Office, and Grand Jury regarding Maple's relationship with Councilman Stone, (b) instigating an investigation of that relationship by the FBI, (c) spreading the fact of these formal accusations and the FBI investigation throughout the community for the purpose of creating an atmosphere of mistrust and suspicion, and (d) publicly accusing Maple of bribery and corruption (e.g., in the three writings) by making insinuations which were calculated to convey the intended defamatory meaning to persons who were aware of the formal accusations and investigation.

again alleging the same causes of action as in Maple's original complaint.

Defendants demurred to all of Maple's causes of action and filed motions to strike all punitive damage allegations of the First Amended Complaint. The ACLU Foundation of Southern California subsequently filed an *amicus curiae* brief in support of defendants' demurrers. In response to defendants' demurrers, Maple filed memoranda raising, among other things, its contention that the First Amendment does not protect calculated lies even when published in a political context, and that other constitutional interests must be balanced against the right to free speech.[3] On February 15, 1980, defendants' demurrers and motions to strike were heard by the Respondent Los Angeles County Superior Court, Judge Vernon G. Foster, presiding. The matter was taken under submission.

On April 24, 1980, Judge Foster entered a Minute Order[4] sustaining without leave to amend defendants' demurrers to one of the three causes of action for libel (the one based on the Ballot Argument), and the causes of action for deprivation of equal protection of the law, conspiracy to deprive equal protection of the law, interference with a prospective economic advantage, and conspiracy to interfere with a prospective economic advantage. Those causes of action, for

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[3] *See* Plaintiff's Memorandum of Points and Authorities In Opposition To Demurrers To, And Motion To Strike From, First Amended Complaint, filed January 16, 1980, pp. 1-3, 23-25, 75-76; Plaintiff's Memorandum of Points and Authorities In Opposition To Demurrer Of Defendant Okun To First Amended Complaint, filed February 11, 1980, pp. 1-2; and Plaintiff's Supplemental Memorandum of Points and Authorities In Opposition to Demurrers Of Defendants Harris and Ruden To First Amended Complaint, filed February 11, 1980, p. 1.

[4] Judge Foster's Minute Order dated April 24, 1980 appears as Appendix B.

which Maple later unsuccessfully sought extraordinary relief from the Court of Appeal and the Supreme Court of the State of California, are not before this Court.

In the Minute Order dated April 24, 1980, Judge Foster also overruled defendants' demurrers to Maple's second cause of action for libel (based on the *Times* Letter), third cause of action for libel (based on the *Courier* Letter), fifth cause of action for conspiracy to commit libel (based on each of the three writings), and sixth cause of action for conspiracy to commit slander. In making his ruling on these causes of action, Judge Foster did not address Maple's contention that the First Amendment did not protect calculated lies, and that it must be balanced against other constitutional interests. Additionally, pursuant to the Minute Order, defendants' demurrers to Maple's fourth cause of action for slander were taken off calendar, and the motions of defendants to strike punitive damage allegations were denied.

In response to Judge Foster's rulings on the second, third, fifth and sixth causes of action of Maple's First Amended Complaint, as well as the motions to strike punitive damage allegations, defendant Okun by himself and defendants Harris and Ruden by themselves filed in the Second Appellate District of the Court of Appeal of the State of California separate petitions for writ of mandate and other relief. On July 28, 1980, the Court of Appeal denied without opinion Okun's and Harris and Ruden's petitions for writ of mandate.[5]

Shortly thereafter, defendant Okun by himself and

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[5]The Orders of the Court of Appeal denying Okun's and Harris and Ruden's petitions for writ of mandate appear as Appendices C and D, respectively.

defendants Harris and Ruden by themselves filed in the California Supreme Court separate petitions for hearing. On October 17, 1980, the California Supreme Court granted both Okun's and Harris and Ruden's petitions for hearing; alternative writs of mandate were issued on October 21, 1980.[6] On February 23, 1981, the American Civil Liberties Union of Northern California and the ACLU Foundation of Southern California filed a Brief *Amici Curiae* with the California Supreme Court in support of the defendants. In briefs filed with the California Supreme Court, Maple argued that the First Amendment did not protect the calculated lies of the defendants, and that other constitutional interests, such as the rights to vote and petition government, would be undermined by extending First Amendment protection to the three writings.[7] Maple also contended, among other things, that Judge Foster should have permitted Maple to amend the causes of action to which he had sustained demurrers without leave to amend.[8] Because Judge Foster had overruled demurrers to the second, third, fifth, and sixth causes of action of the First

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[6]Although Okun's and Harris and Ruden's petitions to the California Supreme Court addressed nearly identical issues and facts, the California Supreme Court consolidated the petitions only for the purpose of oral argument and the issuance of its opinion. *See* Pet. App., p. 2.

[7]*See* Return to Alternative Writ of Mandate, filed in California Supreme Court Case No. L.A. 31341 on November 17, 1980, pp. 3-6, 99-102; Return to Alternative Writ of Mandate, filed in California Supreme Court Case No. L.A. 31342 on November 17, 1980, pp. 3-6, 76-79, 104-106; Answer To Brief *Amici Curiae* Of The American Civil Liberties Union Of Northern California And The ACLU Foundation Of Southern California, filed on March 24, 1981 in California Supreme Court Case Nos. L.A. 31341 and L.A. 31342, pp. 15-21, 28-36.

[8]*See* Return to Alternative Writ of Mandate, filed in California Supreme Court Case No. L.A. 31341 on November 17, 1980, pp. 126-132; Return to Alternative Writ of Mandate, filed in California Supreme Court Case No. L.A. 31342 on November 17, 1980, pp. 150-156.

Amended Complaint, Maple did not anticipate that the California Supreme Court would reverse Judge Foster and deny leave to amend.[9]

After the California Supreme Court issued its opinion on June 15, 1981, Maple and defendants filed petitions for rehearing. In its petition, and in response to defendants' petition, Maple set forth the arguments presented here.[10] On July 15, 1981, the California Supreme Court denied without opinion both petitions for rehearing.[11]

ARGUMENT

A. The California Supreme Court Has Improperly Balanced Defendants' First Amendment Speech Interests And Other Important, Constitutionally Protected Interests.

1. *Introduction.*

Maple here complains of a most dangerous variety of speech: the conspiratorial and political calculated false accusation — a lie conceived and used by a conspiracy of citizens, to damage the reputation of an opponent, in order to change the course of a community's future. Nevertheless, the California Supreme Court, noting the leeway for free speech created by the First Amendment, has afforded protection to the intentional character assassination allegedly contained in the three writings by: (1) applying an unprecedented strict construction to find the alleged

[9] *See* note 21 *infra* and accompanying text.

[10] *See* Maple's Petition for Rehearing, filed in California Supreme Court Case Nos. L.A. 31341 and L.A. 31342 on June 30, 1981; Answer of Maple Properties to Petitioners' Petition for Rehearing, filed in California Supreme Court Case Nos. L.A. 31341 and L.A. 31342 on July 8, 1981. The second question presented here was argued by Maple in those briefs in a form similar to that set forth in this petition, although the specific claim of a violation of due process was not contended below.

[11] *See* note 1 *supra*.

innuendo was not supported by the three writings' words; (2) finding the three writings, made without belief in their truth, and predicated upon false facts, to be opinion, not libelous; and (3) holding that known false attacks upon public figures, short of explicit criminal accusations, including the knowing false charge of conflict of interest, is protected speech.

Calculated falsehoods are entitled to no constitutional protection, and extending freedom of speech, beyond that already afforded by *New York Times Co. v. Sullivan*[12] and *Gertz v. Robert Welch, Inc.*[13] creates little, if any, "breathing room" for protected speech. On the other hand, affording protection to the calculated lie undermines the unfairly accused's constitutionally protected right of personhood (reputation and privacy) and right to petition government for *his* grievances, as well as the right of all citizens to vote and to a democratic government under law. Therefore, Maple respectfully submits that the combined force of so many fundamental rights, together with the uncertain — surely slight — advancement of First Amendment interests to be gained by protection for calculated lies in plebiscites, beyond that already afforded by *New York Times* and *Gertz*, compels the conclusion that the grant of immunity by the California Supreme Court for the three writings here has denied Maple equal protection and due process of law.

2. *By Using A Strict Construction, the California Supreme Court Has Afforded Protection To Alleged Conspiratorial Calculated Lies.*

In holding that the three writings are not reasonably susceptible to a defamatory meaning, the California

[12]376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964).

[13]418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974)

Supreme Court, recognizing the interest of defendants in free speech, departed from precedent to apply a strict rule of construction against finding the possibility of a defamatory understanding. Without such strict construction, these three writings certainly would be reasonably susceptible to a defamatory meaning. The three writings, taken together, charged, among other things, the following:

(1) "mysterious" and "amazing" events occurred in the halls of city government which made citizens "suspicious of the council's motives";

(2) "incredible" alterations of plans for municipal services facilities were passed by the city council;

(3) the developers "hired" a city councilman [Stone], who did not divulge his relationship with the developers immediately and who was found to have a conflict of interest by these actions;

(4) the plan for municipal services was changed "drastically" to cooperate with an " 'Enrich the Developers' scheme"; and

(5) "[t]he entire industrial zone scenario reads uncomfortably like a John D. McDonald novel of Florida land wheeler-dealers mired up to their necks in the deception of the public."[14]

The California Supreme Court construed the three writings by focusing upon their possible innocent meaning, and ignoring their possible defamatory meaning. For example, the Court reasoned that the accusations of the *Times* Letter "do not necessarily imply wrongdoing." Pet.App. at 6. As for the Ballot Argument, the Court concluded: "[t]hat plaintiff 'hired' a councilman conveys no more than they

[14]The novel is unambiguously identifiable as *Condominium*, in which developers explicitly bribe public officials in return for favorable actions on real estate development plans.

formed a business relationship." Pet.App. at 16. For what legitimate business purpose does one hire a councilman?

The California Supreme Court clearly departed from the rule that if in the context of the surrounding circumstances, the *mere possibility* of a defamatory understanding exists, then the matter should be decided by a jury at the time of trial rather than by a court on demurrer. *Carlisle v. Fawcett Publications, Inc.*, 201 Cal.App.2d 733, 743, 20 Cal.Rptr. 405 (1962); *see also Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). In *Carlisle, supra*, the Court quoted as follows from *Gallagher v. Chavalas*, 48 Cal.App.2d 52, 58, 119 P.2d 408 (1941):

> " '[b]efore a demurrer to a complaint containing innuendoes may be properly sustained it must appear that the publication is *not* reasonably susceptible of the defamatory meaning and cannot reasonably be understood in the defamatory sense pleaded; and that *where the words used are susceptible of more than one meaning*, one of which is the libelous meaning placed upon them by the plaintiff in the allegations of his complaint, then the question of whether the words are defamatory or of innocent import should be left to the jury for determination under proper instructions, *even though the covert meaning ascribed to them be improbable.*' " (Emphasis added). 48 Cal.App.2d at 58.

This Court in *Rosenblatt, supra*, considered a public comment on the management of a county ski area by county officials in the context of a public controversy over the ski area. In substance, the letter at issue asserts that the financial condition of the ski area was significantly better during a poor ski season

than during a good one. The letter concludes with this language:

> " '[W]hat happened to all the money last year? and every year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [respondent's replacement as Supervisor] wrought to make such tremendous difference in net cash results?' " 383 U.S. at 78-79, 86 S.Ct. at 672.

This Court recognized that:

> "The column on its face contains no clearly actionable statement. Although the questions 'What happened to all the money last year? and every other year?' could be read to imply peculation, they could also be read, in context, merely to praise the present administration." 383 U.S. at 79, 86 S.Ct. at 672.

The plaintiff in *Rosenblatt* was one of the supervisors to whom the administration of the ski area had been committed during the earlier years. He had recovered a judgment of $31,500, which had been affirmed by the New Hampshire Supreme Court. Although the award of damages for plaintiff was reversed because of an erroneous jury instruction which permitted recovery without proof that the public comment referred specifically to him, this Court remanded the case for a new trial, necessarily holding that the letter was capable of a defamatory meaning sufficient to support an award of damages on retrial.

Maple submits that the three writings are susceptible of a defamatory meaning, and the conclusion of the California Supreme Court to the contrary was erroneous.

3. *By Employing A Questionable Fact-Opinion Dichotomy, The California Supreme Court Has Afforded Protection To Alleged Conspiratorial Calculated Lies.*

The California Supreme Court also found the three writings, made without belief in their truth, and predicated upon false facts, to be nonactionable opinion. Opinion is a belief based on what seems true, valid, or probable to one's own mind; a statement made without belief in its truth cannot therefore be an opinion. Here Maple alleges that the defendants, pursuant to a conspiracy, published knowing lies calculated to injure Maple's reputation. Defendants therefore were not expressing their opinion; they were, according to the First Amended Complaint, merely lying.

Further, while there may be no such thing as a false idea, there are ideas based upon false facts. Maple alleged that the statements made in each of the three writings were false and even sought to have the California Supreme Court take judicial notice of another action in order to establish that particular factual statements in the *Times* Letter were false. The California Supreme Court stated: "The assertions add nothing to the [First Amended] complaint's allegations that the statements are false. Their falsity, if proved, would not make them defamatory. (Citation omitted.)" Pet.App. at 10, n.1. A statement, even if in the form of opinion, should be actionable if based upon false facts intentionally fabricated by the author or speaker in order to support his "opinion".

Finally, the difference between fact and opinion is often nebulous if not indistinguishable.[15] This is

[15] *See* Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 Vanderbilt L.Rev. 1203 (1962).

particularly true here, where defendants created an atmosphere of distrust and suspicion of Maple and then launched the three writings into an already emotionally charged context. In fact this case illustrates the faulty premises underpinning the distinction between fact and opinion. The distinction assumes that a statement of fact more effectively influences its reader or hearer. The distinction does not account for the precise words used, the reputation of the publisher, or the type of audience addressed. All of these factors certainly bear upon whether a statement is actionable.[16]

Maple submits that a statement made without belief in its truth and predicated upon false facts either is not opinion, or, if opinion, is actionable, and the conclusion of the California Supreme Court to the contrary was erroneous.

4. *The California Supreme Court Held As Protected Speech Known False Attacks, Short Of Criminal Accusations, On The Character Of A Public Figure.*

The California Supreme Court held that any attack on Maple's character contained in the three writings, including the charge of participating in a conflict of interest, short of an explicit accusation of criminal behavior, was within the bounds of protected political debate. The Court found Maple to be a public figure and held that the First Amendment protects even sharp attacks on a public figure's character. Pet.App. at 8. Maple submits that the First Amendment does not protect knowingly false attacks on the character of a public figure (which Maple, in any event, asserts it is not), and the conclusion of the California Supreme Court to the contrary was erroneous.

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[16] *Id.*

Further, there exists a conflict among the highest courts of the states regarding whether an accusation of a conflict of interest constitutes actionable defamation. The highest courts of New York and Texas have ruled that an accusation of a conflict of interest is actionable defamation, while the Supreme Courts of Delaware, Pennsylvania and California (through its June 15, 1981 opinion in this case) have found that an accusation of conflict of interest is not actionable. Free speech considerations compel that this Court resolve the conflict among the rulings of the highest courts of California, Delaware, New York, Pennsylvania and Texas as to whether a charge of conflict of interest constitutes actionable defamation.

In its June 15, 1981 opinion, the California Supreme Court found that an accusation of a conflict of interest was not actionable defamation.[17] In analyzing the Second Cause of Action (*Times* Letter), the California Supreme Court stated: "A statement regarding (1) a public official's business, social, or political affiliations, and (2) how those affiliations seem reflected in decision-making hardly constitutes a libelous charge of bribery and corruption." Pet.App. at 9.

In *Foster v. Laredo Newspapers, Inc.*, 541 S.W. 2d 809 (1976), *cert. den. sub nom. Laredo Newspapers, Inc. v. Foster*, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573 (1977), the alleged libel was found in a newspaper article published by defendants, which allegedly attributed to plaintiff, among other things, a direct conflict of interest between his duties as a county surveyor and his private civil engineering practice.

The Supreme Court of Texas reversed a summary

[17]The Court so held despite the fact that engaging in a conflict of interest by a public official is a crime. Cal. Government Code § 91000 (West's Ann.Supp. 1981).

judgment ruling in favor of defendants and remanded the case for trial. The Court found that defendants failed to establish the applicability of the *New York Times* actual malice rule and that plaintiff could recover damages from the publisher of a defamatory falsehood as compensation for actual injury upon a showing that the publisher knew or should have known that the defamatory statement was false. Therefore, the Texas Supreme Court necessarily found that an accusation of a conflict of interest is actionable.

Kerwick v. Orange County Publications Div. of Ottoway Newspapers, Inc., 53 N.Y.2d 625, 438 N.Y.S.2d 778, 420 N.E.2d 970 (1981), was a libel action in which defendant newspaper published an editorial concerning a "perceived conflict of interest" on the part of plaintiff. In reversing the Appellate Division's order granting defendant's motion for summary judgment, the Court held that a trial was required on the issue of malice; the clear implication of the ruling is that an accusation of a conflict of interest is actionable defamation.

The Supreme Court of Pennsylvania reached an opposite conclusion in *Redding v. Carlton*, 223 Pa. Super. 136, 296 A.2d 880 (1972). That case was a libel action by a township supervisor (a public official) against opponents of a proposed purchase of a site for new township headquarters. The defendants alleged that plaintiff's dual role as township supervisor and property owner constituted a "conflict of interest at the very least, and perhaps much more." 296 A.2d at 881. The Supreme Court of Pennsylvania found that the purported defamatory statement was: ". . . a truthful remark characterized by the type of rhetorical hyperbole common to American politics," (296 A.2d at 882), and affirmed the trial court's granting of defendants' demurrer.

Similarly, in *Andres v. Williams*, 405 A.2d 121 (1979), the Delaware Supreme Court held that comments about plaintiff, including a statement that he had a conflict of interest, did not amount to defamation. The Court affirmed the Delaware Superior Court's order granting defendants' summary judgment motion.

The decisions of the highest courts of five states are at odds regarding whether a charge of a conflict of interest is actionable defamation. That disagreement, together with the important constitutional interests which are the subject of this particular dispute, warrant review by this Court.

5. *The Conspiratorial Calculated Lie Is Not Protected Speech, And Affording Protection To It Would Create Little, If Any, Breathing Room For Protected Speech.*

This Court has flatly stated: "[T]here is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340, 94 S.Ct. at 3007. As for the willful false statement of fact, this Court has described it as "a tool . . . at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison v. State of Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964). This Court has made privileged certain non-willful defamatory statements not because the false statement itself is entitled to constitutional protection but rather because of the so-called "chilling effect" that lawsuits for defamation might have upon protected speech. *New York Times Co. v. Sullivan*, 376 U.S. at 280-82, 84 S.Ct. at 726-27.

Yet a court can only guess that rules which sacrifice the individual's right to recover damages for injured

reputations may create "breathing space" for the exercise of First Amendment rights.[18] In various contexts, this Court has even expressed skepticism toward the substance and reality of a "chilling effect" on the exercise of First Amendment rights flowing from the mere threat of sanctions. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (holding that requiring newsmen to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the First Amendment and noting that such requirements have a "consequential, but uncertain, burden on news gathering"); *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), *reh. den.* 409 U.S. 901, 93 S.Ct. 94, 34 L.Ed.2d 165 (finding no "chilling effect" on the exercise of plaintiff's First Amendment rights by the mere existence and operation of the Army's intelligence-gathering and distributing system).

Any "chilling effect" on protected speech resulting from the failure to protect calculated lies is particularly marginal, as well as speculative, since this Court has already erected substantial barriers to most defamation actions. After *Gertz* no plaintiff, as a practical matter, will be able to recover in an action for defamation unless he can show actual damages and fault. Furthermore, many plaintiffs will be able constitutionally to recover under *New York Times* only by clear and convincing proof that the defendant's false and defamatory statement was made with actual malice — that is, with knowledge of its falsity or with reckless disregard for its truth.

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[18] *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 S.Ct. Rev. 267, 299 (1967) and Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 Boston Univ. L. Rev. 685 (1978).

These two cases are not insubstantial barriers. Justice Powell, speaking for the Court in *Gertz*, referred to the *New York Times* standard as "an extremely powerful antidote" to the "chilling effect," (418 U.S. at 342, 94 S.Ct. at 3008), and Justice White, dissenting in *Gertz*, referred to the standard set forth by the majority in that case as a "further emasculation of state libel laws." 418 U.S. at 399, 94 S.Ct. at 3036. The practical effect of the *New York Times* standard has been to defeat recovery in nearly all litigated cases in which the rule has been applied.[19]

The California Supreme Court in this case has erected an even higher barrier to defamation actions. Yet this Court has already concluded that higher standards would serve no constitutionally cognizable purpose. "[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." *Time, Inc. v. Hill*, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456 (1967) (emphasis in original).

Maple contends, moreover, that judicially created leeway for intentional falsehoods would encourage the use of speech which is inimical to the Constitution rather than that which is protected by it. By removing any judicial redress for certain false accusations, those which may be characterized as opinion or those against public figures which stop short of explicit criminal charges, character assassins could "come out of the closet" and openly adopt, as a political tactic, a variety of damaging false and disparaging attacks, as well as other forms of propaganda. These character assassins could adopt the tactic of a blatant threat to blacken the name of any person wishing to step forward to express an opposing viewpoint in a political debate.

[19] *See* L. Tribe, *American Constitutional Law*, p. 640 (1978).

Therefore, Maple submits that shielding from liability those who conspire to defame would provide far more encouragement, as well as protection, for those whose political participation is hostile to our democratic system of government than it would for the larger segment of our society whose political participation is in good faith. *New York Times* and *Gertz* are designed to protect the good faith participants, and the rules fashioned by the California Supreme Court only extend protection to the bad faith participants.

6. *Judicial Leeway For Conspiratorial Calculated Lies Undermines Several Constitutionally Protected Fundamental Rights Of Both The Accused And Society.*

Protecting the calculated lie does not significantly advance any constitutionally important interest, but it does eviscerate several: the individual's right of privacy and the right to a good name; the unfairly accused's right to petition government concerning his grievances; the right to vote; and the right of all citizens to a democratic government under law.

a. *Protecting Calculated Lies Would Undermine Maple's Precious Rights Of Personhood.*

The individual's right to the protection of his or her good name

> "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our

constitutional system." *Rosenblatt v. Baer*, 383 U.S. at 92, 86 S.Ct. at 679 (Stewart, J., concurring, quoted in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341, 94 S.Ct. at 3008.)

Defendants, as conspirators who published known lies with specific intent to injure reputation, acted with complete disregard for Maple's constitutionally guaranteed right to the protection of its good name. We are now experiencing a social trend toward less, as opposed to more, individual privacy and more, as opposed to less, defilement of reputations. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 390, 94 S.Ct. at 3032 (White, J., dissenting, noting the "vigorous and robust" press of today). According leeway to willful falsehoods for the sake of greater First Amendment freedom, to the complete abrogation of the individual's right to privacy and a good reputation, cannot be justified theoretically or empirically, serves no compelling governmental purpose, and therefore is constitutionally impermissible.

b. *Protecting Calculated Lies Would Deprive Maple, As Well As Others, Of The Right To Petition Government.*

Protecting calculated liars would unleash forces which are as harmful to the general public as they are to the targeted individuals. To license one person to abuse a privilege is to deny the rights of the person who is the object of that abuse.

Therefore, in an initiative or referendum election process, the unfairly accused may not only lose his reputation but also be effectively precluded from petitioning government concerning *his* grievances. The truth never catches a lie, and this is particularly true in an election where its turbulent and brief life makes virtually impossible effective refutation of a lie before the all important election day. In an

initiative or referendum election, both proponents and opponents of the ballot proposition are petitioning government —the people — for redress of grievances; and licensing one side of the issue to defeat the other through calculated lies necessarily infringes on the First Amendment rights of the other.

In this case, Maple had just as much right to petition the people of the City of Beverly Hills for the desired zoning as defendants and their fellow conspirators had to defeat it. By effectively precluding Maple from presenting its side of the issue through false charges of bribery and corruption, defendants denied Maple *its* First Amendment rights.

Affording protection for conspiratorial character assassination in the context of referendum or initiative elections would also have its own "chilling effect" upon the exercise of First Amendment rights. Fear of groundless attacks for which there can be no judicial redress would deter citizens from stepping forward to become actively involved in plebiscitary exercises. "This would turn the First Amendment on its head." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 400, 94 S.Ct. at 3036 (White, J., dissenting). Therefore, granting immunity to political character assassins would directly, as well as indirectly, undermine the right to petition government.

c. *Protecting Calculated Lies Would Undermine The Right To Vote.*

Affording leeway for calculated lies in circumstances such as here would also undermine the right to vote, which is a fundamental right under the United States Constitution. *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964), *reh. den.* 379 U.S. 870, 85 S.Ct. 12. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964). This right

must mean more than mere access to the polling place; citizens should have the opportunity to cast a meaningful vote reflecting a decision made with accurate information. The deceitful electioneer's very purpose, however, is to strip away from the voter his freedom of choice by seducing him with lies to vote the desired way.

Even the right of free speech becomes meaningless ultimately if the ability of a citizen to affect his own political destiny through an informed decision made at the ballot box is forcibly — though artfully — removed. Defendants took away from the Beverly Hills electorate its ability to cast a meaningful vote. Thus Maple contends, and seeks to prove, that the City Council, together with its investigative committees, had concluded that the zoning was in the best interests of the City, but the citizens of Beverly Hills were induced to vote against their own best interests by carefully orchestrated false charges that Maple had bribed the City Council to obtain the zoning.

To persuade someone fraudulently to vote for something he would, in light of the true facts, reject must surely undermine the right to vote. To undermine the right to vote is to make all other rights, including the right of free speech, illusory. Shielding from liability authors of statements intended to deceive the voters would undermine the right to vote.

d. *Protecting Calculated Lies Would Undermine Our Society's Expectations Of Ordered Liberty.*

The ultimate cost of judicially protecting all these invasions by defendants would be to undermine our society's notions of liberty under law and to threaten our accepted way of life: the use of the known lie is at odds with the premises of democratic government

and with the orderly manner in which economic, social, or political change is to be effected. *Garrison v. State of Louisiana*, 379 U.S. at 75, 85 S.Ct. at 216; *Canon v. Justice Court*, 61 Cal.2d 446, 452-53, 39 Cal.Rptr. 228, 393 P.2d 428 (1964) ("It is clear that the integrity of elections [is] essential to the very preservation of a free society . . .").

Defamation of opponents is one of the standard devices of political propaganda and has been used by both fascists and communists to effectuate revolutionary change. Reisman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Columbia L.Rev. 1085, 1088 (1942). The unevenly administered German libel laws, together with the skillful use of character assassination by the Nazis, was responsible in significant part for Hitler's rise to power. *Id.* at 1098-1102. In this country, the McCarthy era was launched and promoted in part by the absolute immunity afforded by the Speech or Debate Clause which allowed Senator McCarthy falsely to accuse many loyal Americans of Communist affiliations.

Providing immunity for calculated lies in plebiscites and other political contexts might subject our democratic and orderly legal processes, as it has done so for other countries, to the spectacle of being contemptuously manipulated by enemies of democracy and law. "Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." *Rosenblatt v. Baer*, 383 U.S. at 94, 86 S.Ct. at 680 (Stewart, J., concurring). Freedom of speech is a precious right which deserves the potent protection our society has afforded it; yet treating this right as an absolute to the complete denial of all other precious rights, particularly in the political process, would destroy the very values it is intended to serve.

7. Conclusion.

This case involves an alleged successful conspiracy to falsely assassinate a person's reputation in order to sway an election. The matter is fraught with complex and critical constitutional considerations. Guidance from this Court is urgently needed to establish the parameters of the many fundamental rights which interplay in this context.

B. By Looking To Some, But Not All, Of The Circumstances Surrounding The Three Writings In Finding Them To Be Nondefamatory And Nonactionable Opinion, And By Refusing Maple Leave To Amend Its First Amended Complaint To Add Additional Relevant And Material Surrounding Circumstances, The California Supreme Court Denied Maple Due Process Of Law.

1. The Surrounding Circumstances Are Facts Critical To The Determination Of Whether A Statement Is Opinion Or Fact, Or Susceptible To A Defamatory Interpretation.

Whether the three writings are susceptible of a defamatory meaning and whether these writings were understood by their readers to be statements of fact or opinion are questions, Maple contends, that can be determined only by looking to the circumstances which surrounded the publication of the statements.

The California Supreme Court has made law of these common sense propositions by holding that the circumstances surrounding an alleged defamatory statement must be reviewed in order to determine whether the readers of the statement understood it in a defamatory sense, and whether such a statement constitutes opinion or fact. Pet.App. at 8, 12; *Good Government Group, Inc. v. Superior Court of Los Angeles County*, 22 Cal.3d 672, 681-82, 158 Cal.Rptr.

258, 586 P.2d 572 (1978), *cert. den. sub nom. Good Government Group, Inc. v. Hogard*, 441 U.S. 961, 99 S.Ct. 2406, 60 L.Ed.2d 1066 (1979); *Gregory v. McDonnell Douglas Corp.*, 17 Cal.3d 596, 602, 131 Cal.Rptr. 641, 552 P.2d 425 (1976).

2. *The California Supreme Court Refused To Consider All Of The Facts Bearing Upon Whether The Three Writings Were Susceptible Of A Defamatory Meaning And Were Opinion.*

In its petition for rehearing to the California Supreme Court, Maple sought leave to amend its First Amended Complaint to allege that defendants, pursuant to a conspiracy, intentionally damaged Maple's reputation by publicly insinuating that Maple was guilty of bribery and corruption, after they had already created suspicion about Maple by making criminal accusations to governmental entities and instigating an FBI investigation regarding Maple's relationship with Councilman Stone and then spreading the fact of the criminal accusations and FBI investigation throughout the community.[20] Maple proposed to allege that the readers of the three writings who knew of the criminal charges and investigation reasonably concluded that the authors of the three writings, defendants Harris, Ruden, and Okun, were making public what they and others had privately complained of to the authorities, *viz.*, the accusation that Councilman Stone and Maple were guilty of bribery and corruption.

To the readers who were aware of defendants' accusations of criminal activity, the three writings are no more than indirect reassertions of the criminal charges. Maple submits that defamatory meaning is patent from the language in the three writings to

[20] *See* note 2 *supra*.

anyone aware of the other charges.

Defendants here made criminal accusations to prosecutorial authorities, informed the community that the charges had been filed, and then publicly asserted in the context of other suggestive, damaging remarks that Maple "hired" a city councilman for an " 'Enrich the Developers' scheme". Are these charges *necessarily* innocent as a matter of law? In their context, were the writings *necessarily* understood to be opinion? May these charges be made falsely without the possibility of liability for defamation? The answers must be "No".

As set forth in its petition for rehearing to the California Supreme Court, Maple proposed specifically to add the following allegations of fact to each of the causes of action in the First Amended Complaint:[21]

> In or about October, 1978, prior to the publications of the Ballot Argument (First Cause of Action), *Times* Letter (Second Cause of Action), and *Courier* Letter (Third Cause of Action), defendants Harris, Ruden, and Okun, and several other persons held a series of meetings for the purpose of discussing steps to be taken to stop any development by Maple of its property. At these meetings, defendants and others agreed to impede Maple's ability to develop its property by assassinating Maple's character. Defendants and others decided that they would damage Maple's reputation by instigating criminal investigations of Maple's relationship with Councilman Stone,

[21]Maple pled an innuendo for each of the three writings, and, in each of the three causes of action immediately following the innuendo pleading, Maple alleged: "The readers of the Libelous Statement [Ballot Argument, *Times* Letter, or *Courier* Letter] understood it in the foregoing sense, and such understanding on the part of said readers was reasonably drawn from the language of the Libelous Statement." At all times, Maple intended to prove the facts set out here at trial in

spreading the fact of these investigations throughout the community in order to create an atmosphere of suspicion and mistrust, and, finally, publicly indicting Maple, and also Stone, of bribery and corruption through the use of innuendo calculated to defame in this context.

One person in this group contacted the United States Department of Justice; another person contacted the Los Angeles District Attorney; and a third person contacted the Assistant Los Angeles District Attorney in charge of the Grand Jury. As a result of these contacts, a criminal investigation of Stone's relationship with Maple was instituted by the FBI.

Defendants Harris, Ruden, Okun and others began to circulate through the Beverly Hills community the fact that they or persons working with them had made accusations to the FBI, Grand Jury, and District Attorney's office, and that, as a result, the FBI was actually investigating Stone and Maple for the crimes of corrup-

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support of the foregoing quoted allegations. Maple believed that all of the surrounding circumstances were evidentiary facts supporting the foregoing quoted ultimate fact; that is, that the readers reasonably drew the defamatory meaning from the language of the Libelous Statement. Maple had not, prior to its petition for rehearing before the California Supreme Court, proposed to add these allegations to the First Amended Complaint since demurrers to the second, third, fifth, and sixth causes of action were overruled by Judge Foster of the Los Angeles Superior Court. *See* Part B of Statement of Facts, *supra*. Until the June 15, 1981 decision of the California Supreme Court, the addition of these allegations was unnecessary. Nevertheless, Maple had, in a brief which had been previously filed with the California Supreme Court, argued that members of the community were aware that defendant Ruden had filed a complaint with the FBI concerning Councilman Stone and, consequently, reasonably concluded, upon reading the Ballot Argument, that defendants Harris and Ruden used the word "hiring" to signal the commission of a crime by Maple (and Councilman Stone). *See* Maple's Return to Alternative Writ of Mandate in California Supreme Court Case No. L.A. 31342, pp. 82-83.

tion and bribery. At the time the Ballot Argument, *Times* Letter, and *Courier* Letter were published, numerous readers of these statements were aware that the FBI, at the instigation of defendants and others, was investigating both Stone and Maple for criminal activity. In fact, the Mayor of Beverly Hills personally inquired of Stone about the FBI's bribery investigation of Stone before Stone himself was aware of it.

These readers reasonably understood that defendants were publicly insinuating what they had already privately complained of to various governmental entities, namely, that Stone and Maple had committed the crimes of bribery and corruption. These readers also reasonably concluded that defendants who had taken official action against Stone and Maple were making accusations of fact rather than merely tendering their opinion.

Here the California Supreme Court looked to some, *but not all*, of the material surrounding circumstances in order to measure the "probable expectancies" of defendants' audience. In its opinion, the California Supreme Court observed that the three writings occurred in the context of a public debate, where the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric, or hyperbole. The California Supreme Court further declared that language which generally might be considered to be a statement of fact may, in this context, assume the character of opinion. Logically, the converse must also be true: *language which ordinarily might be considered to be a statement of opinion may, in a different context, become a statement of fact.*

Pursuant to its proposed amendment, Maple sought

to allege that defendants intentionally created a context to give their implied charges the desired defamatory meaning. Maple also proposed to allege that defendants succeeded and that readers of the three writings who knew of defendants' formal accusations and the FBI investigation reasonably understood the publications to be veiled indictments. By denying Maple leave to submit its proposed amendment, the California Supreme Court necessarily did not observe all the facts surrounding the publication of the three writings.

3. *By Refusing Maple Leave To Amend Its First Amended Complaint, The California Supreme Court Denied Maple Due Process Of Law.*

Notwithstanding its acknowledgment of liberal pleading requirements in California, the California Supreme Court denied Maple leave to amend the second, third, and fifth causes of action, stating that (1) " 'there are no circumstances under which an amendment would serve any useful purpose' [citation omitted]" and (2)" 'speedy resolution of cases involving free speech is desirable' to avoid 'a chilling effect upon the exercise of First Amendment rights' [citation omitted]." Pet.App. at 21.

Both reasons for denying Maple leave to amend are highly questionable. First, the California Supreme Court did not permit Maple to restate or alter its allegations. Here and in its petition for rehearing filed with the California Supreme Court,[22] Maple proposes to add to the First Amended Complaint additional circumstances which impart defamatory meaning to the three writings. Maple has never had an opportunity to amend the allegations of the second, third, and fifth causes of action of the First Amended Complaint since before February 15, 1980, when the

[22] *See* pp. 26-28, *supra*.

demurrers were heard before Judge Foster and the matter was taken under submission. This Court has held that where a lower court has denied a party the ability to fully present his case, the denial constitutes a deprivation of procedural due process. *See Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1916); *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165, 171, 55 S.Ct. 701, 703, 79 L.Ed. 1365 (1935), *conformed to sub nom. Georgia Power Co. v. City of Decatur*, 181 Ga. 187, 182 S.E. 32, *aff'd*, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925 (1936). The denial of leave to amend here adversely affects Maple's constitutional rights.

Second, the California Supreme Court's interest in the "speedy resolution" of this case simply fails to recognize the other constitutional interests and principles discussed in Part A of this section of the petition, *supra*. This Court has acknowledged that other constitutional considerations are sometimes paramount to a litigation's swift and efficient disposition. *See Stanley v. Illinois*, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551 (1972); *United States Department of Agriculture v. Murry*, 413 U.S. 508, 513-14, 93 S.Ct. 2832, 2835, 37 L.Ed.2d 767 (1973). Those constitutional considerations, which include Maple's right of personhood and the rights to vote and to petition government, were dismissed by the California Supreme Court. They require this Court's scrutiny.

Maple's proposed amendment contained allegations of a conspiracy to injure and defame not presented to the California Supreme Court before it issued its June 15, 1981 opinion. By denying Maple leave to amend the second, third, and fifth causes of action of the First Amended Complaint, the California Supreme Court prevented Maple from a constitutionally

authorized opportunity to demonstrate that the three writings were susceptible to the alleged innuendo, and that the three writings were understood by their readers as fact, not opinion. Maple should have a full and fair opportunity to be heard.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the orders and opinion of the Supreme Court of the State of California.

Respectfully submitted,

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Appendix

81-719

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CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MAPLE PROPERTIES,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.
(BETTY H. HARRIS, JOANN RUDEN, AND ERWIN OKUN,
Real Parties in Interest.)

APPENDIX

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APPENDIX A

SUPREME COURT
FILED
Jun 15 1981
LAURENCE P. GILL, Clerk

Deputy

THE SUPREME COURT OF THE STATE OF CALIFORNIA

ERWIN OKUN, *Petitioner,* *v.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31341
BETTY H. HARRIS et al., *Petitioners,* *v.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31342

SEE CONCURRING AND DISSENTING OPINION

The complaint here alleges libel and slander during defendants' (petitioners') successful campaign for repeal of an ordinance that would have enabled plaintiff (real party in interest) to build a large condominium project in Beverly Hills. Our reading of the complaint persuades us that the publications in question could not reasonably be found libelous and that plaintiff's pleading of a conspiracy to slander is deficient.

The lawsuit was begun in September 1979. A first amended complaint names Betty Harris, Joann Ruden, Erwin Okun, and Does 1 through 1,000 as defendants and alleges 10 causes of action against various combinations of those defendants. Demurrers by Harris, Ruden, and Okun were sustained as to the first, seventh, eighth, ninth, and tenth causes, overruled as to the second, third, fifth, and sixth causes, and ordered off calendar as to the fourth cause (because it names only Doe defendants).

In response to the present petitions, we issued alternative writs of mandate inviting plaintiff and the trial court to show cause why the demurrers to the second, third, fifth, and sixth causes of action should not be sustained.

FACTUAL CONTEXT OF THE ALLEGED DEFAMATION

The first cause of action is not directly before us; but its introductory paragraphs, setting out background facts, are incorporated into each of the four causes whose sufficiency we now weigh. The paragraphs allege:

Plaintiff is a limited partnership that purchases, manages, develops, and sells real property. In 1977 it

bought 10 acres of Beverly Hills property with a view to building condominiums. The property, then under a building moratorium pending determination of zoning, adjoined city-owned parcels. Plaintiff had discussed with city officials the possibility of a land exchange so that plaintiff and the city each would own contiguous land. The discussions concluded successfully on November 28, 1978, when the city council agreed to the land exchange and adopted a zoning ordinance allowing plaintiff to construct condominiums on all its newly acquired property.

To prevent construction, defendants circulated and then filed a petition to allow the electorate to reject or accept the ordinance. Consequently the council placed it on the ballot for an election held March 9, 1979. It was rejected and thus repealed. Defendants were "motiviated [sic] by ill will toward [plaintiff]" and "campaigned against the passage of Proposition B in order to stop [plaintiff's] condominium project, among other ways, be defaming [plaintiff]. Said defendants variously and falsely accused [plaintiff] of corrupt and collusive activities in connection with City officials."

SECOND CAUSE OF ACTION

The second cause alleges that Harris and Does 101 through 200 wrote this letter to the editor of the Los Angeles Times, wherein it was published on January 28, 1979:

"Setting the Record Straight

"The article regarding a controversial land swap between the Beverly Hills City Council and a developer of luxury condominiums ('Land Swap Stirs Up Beverly Hills' by Sam Kaplan, Dec. 26) missed the point entirely.

"To set the record straight:

"While the area in contention—adjacent to Beverly Hills' civic center—is known as the industrial area, it also houses the city's vital municipal services facilities. It is the site of the city's refuse transfer station, vehicle maintenance garages and all the other indispensable operations that make a city function. It is also the site of a water treatment plant that the city council abandoned in 1976.

"This action was followed by the council's abandoning the city's own water wells in the midst of the recent drought. It was this incredible move that caused a number of citizens to become suspicious of the council's motives. Beverly Hills residents were thus forced to become completely dependent upon one very expensive source of water, that supplied by the Metropolitan Water District of Southern California. Even the MWD's general manager advised the city against this decision.

"Nevertheless, this was done despite the fact that in 1974 the voters of Beverly Hills had passed, by a two-thirds majority, a $3.75 million bond issue to refurbish the city's water wells and treatment facilities. The only council member opposed to the bond issue and retention of the city's wells was Richard Stone, an attorney.

"Mysteriously, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were $5 million short. Amazingly, a year later the claim went up to $12 million more than the voter-approved bonds. But, without asking the voters again, in December, 1976, the council closed down the wells and sold off the land on which they were located.

"Not until April 12, 1977, did Richard Stone, at that time the mayor of Beverly Hills, reveal that David Rowen, representing a developer, had become a client of Stone's. The abandoned treatment plant is now earmarked for the developers in a landswap deal."

Further it is alleged: The letter referred to plaintiff as the "developer" (see Code Civ. Proc., § 460) and was intended and reasonably understood to mean that plaintiff "had (a) conspired for a period of years with Councilman Stone to cause the City to abandon its water well system in order to make the water treatment plant obsolete and allow [plaintiff] to acquire the property on which the water treatment plant was located for [plaintiff's] private gain and (b) conspired to commit, and did commit, the crimes of bribery and corruption." The letter "as applied to [plaintiff], is false" and omits facts that, if included, "would not have caused the readers . . . to believe that plaintiff had acted as intimated in the [letter]." Harris wrote the letter "either intentionally knowing it was false or with reckless disregard for" truth. She did it "to injure [plaintiff] and stop any development by it" and was "motivated by malice and ill will toward plaintiff."

Was the letter libelous? Clearly it permits a non-defamatory interpretation. The facts that in April 1977 plaintiff "had become a client of [council member] Stone" (who in 1974 had opposed retention of the city's wells), that in 1976 the wells and water treatment plant were abandoned, and that in 1979 the treatment-plant site was "earmarked for the developers [plaintiff] in a landswap deal" do not necessarily imply wrong-doing. There is no explicit statement that Stone had represented plaintiff for any substantial period before April 1977 or was improperly influenced by plaintiff in his handling of city affairs.

Nonetheless a writing's susceptibility to innocent meaning does not in itself preclude a finding that an ordinary reader would understand it in a libelous sense. (MacLeod v. Tribune Publishing Co. (1959) 52 Cal.2d 536, 546-551; see Forsher v. Bugliosi (1980) 26 Cal.3d 792, 803, 805.) To show libelous meaning, plaintiff alleges by way of innuendo that the letter was understood to mean that plaintiff "conspired" with Stone to cause the city to abandon its wells so as to make the treatment plant obsolete and allow plaintiff to acquire the site "for private gain," and that plaintiff "conspired to commit, and did commit, the crimes of bribery and corruption." However, "it is not the purpose of an innuendo to 'beget an action', and the meaning of the language complained of may not be enlarged or extended thereby. [Citations.] In other words, it is the office of the innuendo to merely explain or interpret, without enlarging, the alleged libelous publication." (Bates v. Campbell (1931) 213 Cal. 438, 442-443.)

Here, plaintiff's innuendo allegations are not supported by the letter's words. The implications deprecatory to plaintiff are mere opinion, not libelous. "An essential element of libel . . . is that the publication in question must contain a false statement of *fact*. . . . This requirement . . . is constitutionally based. The reason for the rule, well stated by the high court, is that 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, fn. omitted . . . .) [¶] The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of

law. [Citations.] The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory* v. *McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601.)

Gregory also confirms that, short of accusations of crime or personal dishonesty, the First Amendment protects even sharp attacks on the character, motives, or moral qualifications of "a public officer or . . . an active participant in a labor dispute." (*Id.*, at p. 604.) There is an analogous leeway for criticism of an individual who voluntarily injects himself or herself into public controversy and so becomes a "public figure". (See *Vegod Corp.* v. *American Broadcasting Companies, Inc.* (1979) 25 Cal.3d 753, 767, 769.) Plaintiff's participation here made it a public figure. (*Greenbelt Pub. Assn.* v. *Bresler* (1970) 398 U.S. 6, 8-9 (developer seeking variances to build high-density housing "clearly fell within even the most restrictive definition of a 'public figure'").)

By those standards the Harris letter is not defamatory. It does criticize abandonment of the wells and treatment plant as unwise, "incredible," a product of "suspicious" motives, and a flouting of the voters' wishes. It reports Councilman Stone's April 1977 revelation that he had become plaintiff's attorney but

asserts no conduct by Stone other than his being the only council member to oppose the water-supply bond issue three years earlier. The implication that he and other council members were motivated by selfish interest rather than the public good is well within the bounds of protected political debate. (*Scott* v. *McDonnell Douglas Corp.* (1974), *supra*, 37 Cal.App.3d 277, 289-291.) A statement regarding (1) a public official's business, social, or political affiliations, and (2) how those affiliations seem reflected in decision-making hardly constitutes a libelous charge of bribery and corruption. A contrary ruling would inhibit a significant segment of the discourse vital in a democracy. (See *Desert Sun Publishing Co.* v. *Superior Court* (1979) 97 Cal.App.3d 49; *Sierra Breeze* v. *Superior Court* (1978) 86 Cal.App.3d 102.)

Plaintiff argues that the letter's title ("To Set the Record Straight") and the words "mysteriously" and "amazingly" in its next-to-last paragraph suggest that the writer knew of unstated improprieties between plaintiff and Stone. (See Rest.2d Torts, § 566 ("a statement in the form of an opinion . . . is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion").) The letter's apparent aim, though, was to disclose whatever pertinent facts were known to the writer. "Mysteriously" and "amazingly" suggest that she did not have knowledge of underlying reasons for the council's actions, though the words also may imply an opinion that the reasons might be subject to severe criticism if revealed. Rather than implying unstated facts, the letter seems "cautiously phrased in terms of apparency." (*Gregory*, supra, 17 Cal.3d at p. 603; Information Control Corp. v. Genesis One Computer

Corp. (9th Cir. 1980) 611 F.2d 781, 783 (California law).)[1]

Good Government Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal.3d 672 is distinguishable. Defendants there stated that plaintiff and other council members "extorted by blackmail $100,000 from [a developer]" in exchange for concessions to the city. (*Id.*, at p. 678.) This court pointed out that, though some charges of "blackmail" may in context not be susceptible of libelous interpretation (*Greenbelt Publ. Assn.* v. *Bresler*, *supra*, 398 U.S. 6), the Seal Beach publication could be found defamatory because it omitted the fact that the $100,000 was paid to the city rather than to plaintiff and his colleagues. (22 Cal.3d at pp. 681, 683.)

THIRD CAUSE OF ACTION

The third cause alleges that Okun and Does 201 through 300 wrote an open letter to the mayor that was published in the Beverly Hills Courier on October 13, 1978. Only the last six of the letter's 24 paragraphs are alleged to be libelous. The first 18, incorporated as an exhibit, address the merits of the controversy alleged in the first cause of action.[2] The last six state:

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[1]After oral argument, plaintiff formally requested that we take judicial notice of the answer to a petition for hearing arising out of a discovery proceeding in a separate libel suit by Stone based on the same letter. The stated purpose of the request is to call to our attention the answer's assertions that particular factual statements in the letter are false. The assertions add nothing to the complaint's allegations that the statements are false. Their falsity, if proved, would not make them defamatory. (*Blackhawk Corp.* v. *Ewing* (1979) 94 Cal.App.3d 640.)

[2]The first 18 paragraphs are as follows: "I strongly object to your recent public statements describing the opposition to the industrial zone development plans as 'a dozen ladies and that's all they are.' [¶] Your remarks are insulting, condescending, arrogant and totally without merit. There's also a bit of male chauvinism lurking there. [¶]

"The entire industrial zone scenario reads uncomfortably like a John D. MacDonald novel of Florida land wheeler-dealers mired up to their necks in deception of the public. [¶] One of our elected officials has already disqualified himself from voting because of real or potential conflict of interest. [¶] You [Mayor Tilem] have now exhibited prejudice publicly to those in opposition and should disqualify yourself. [¶] One of the three councilmembers left is a real estate

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The number of residents opposed to the plans are far greater than a dozen, including men and women, who care deeply about the future independence of this city. [¶] If the 'dozen' you are referring to are the individual who have addressed the council on the zoning matter, you are putting down some very fine, dedicated people, including several elected representatives of civic and community-action groups. They speak for far more than themselves. [¶] Their only vested interest is the well-being, integrity and continued viability of our city. [¶] But who speaks publicly in defense of the plan? [¶] The developer's banker, the developer's contractor, the developer's advertising man, the developer's sales agent, the developer's etc. [¶] You have also stated that you 'would certainly never sign papers to trade away land that we need.' But what else are you doing if you proceed with this plan? [¶] The 'dozen ladies' and others keep asking the same pertinent, valid questions that, if answered, could put all arguments to rest. [¶] However, only evasive, obtuse and hardly reassuring responses come back. [¶] —Where will our municipal services go? [¶] —Why should the city incur enormous costs to move them? [¶] —Are we going to become a contract city, beholden to outside vendors? [¶] —Where will our water come from when we are totally at the mercy of the MWD and rates treble and we are in a drought worse than the recent one? [¶] —Why are we trading land which we should be buying—like other cities that are landbanking for the future? [¶] But the even larger question is who will gain from this plan? The majority of residents, or the very few individuals with a vested interest in the condominium project? [¶] And what about all the ambiguous promises to the senior citizens? The 100-unit housing promise is a blatant, political carrot in return for their dedicated support. [¶] Can you honestly tell the folks there really will be such a building for them exclusively? What will the costs be? $300 a month? $650? Who will determine those with highest priority? How can you restrict entry to city residents only, if state and federal money is involved? And what about the hundreds and hundreds of needy, Beverly Hills seniors who will be left out?"

developer, obviously sympathetic to fellow builders and realtors, though he has no business interests in the city. [¶] That leaves two, and we elected five to the council to represent us. [¶] Isn't it time to remove the clouds of suspicion, innuendo, rumor, secret talks and shrouded negotiation and return the matter to the people in the form of a referendum?"

The innuendo pleading is directed solely at the first sentence, concerning the John D. MacDonald novel. It is alleged that the novel, titled *Condominium*, "is about a fictional company, the Marliss Corporation, which bribes public officials and engages in other illegal activities so that it can build dangerously defective buildings." Okun's letter is alleged to have referred to plaintiff as the "Florida land wheeler-dealers" and to have been intended and reasonably understood as meaning that plaintiff "was engaging in illegal and collusive activities similar to those of the Marliss Corporation in *Condominium*." The allegations of falsity, omission of material facts, and malice are parallel to those in the second cause of action.

Clearly the letter's statement about the novel is one that "assume[s] the character . . . of opinion" when "potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts . . . to persuade . . . by use of epithets, fiery rhetoric or hyperbole" (*Gregory*, *supra*, 17 Cal.3d at p. 601). Though perhaps it imputes vigorous lobbying to plaintiff and denounces plaintiff's project as inimical to the city's interest, the letter cannot fairly be read as charging bribery or other crime.

FIFTH CAUSE OF ACTION

The fifth cause ("Conspiracy to Commit Libel") alleges that beginning in January 1978 Harris, Ruden, Okun, and Does 401 through 500" conspired to discredit [plaintiff] and destroy its reputation in the community for the purpose of stopping any development by [plaintiff]," that they did the acts described in the first, second, and third causes of action (incorporated by reference) in furtherance of the conspiracy, and that they "were motivated by malice and ill will toward [plaintiff]."

A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong. (*Unruh* v. *Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631; *Chicago Title Ins. Co.* v. *Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316; *Pettitt* v. *Levy* (1972) 28 Cal.App.3d 484, 491.) Accordingly the demurrer to the fifth cause should have been sustained if no actionable conduct is alleged in the first, second, or third causes. Having established the insufficiency of the second and third, we turn to the first.

The statements that the first cause identifies as libelous appear in an "Argument Against Proposition B" allegedly prepared by Harris, Ruden, and Does 1 through 100 and included in the "Sample Ballot and Voter Information Pamphlet" mailed to the voters in connection with the election on March 6, 1979. It reads:

ARGUMENT AGAINST PROPOSITION B

Beverly Hills has only one Industrial Area to sustain us as an independent city. *We must keep it*

for our community needs and not allow it to be zoned away.

Vote NO on Proposition B.

We need a place for police cars, carpentry and paint shops, city truck maintenance, park equipment, trash disposal, water facilities and other lifeline services essential to our community.

These indispensable city services enable Beverly Hills to operate efficiently and at low cost. They must be contained in the Industrial Area for they are unpleasant neighbors. We cannot afford to allow developers to take over the only suitable location within our city for these vital needs.

Every citizen approved General Plan designated this land to be saved for municipal and service use. The developers hired one of our Councilmen, subsequently the Fair Political Practices Commission rules the Councilman had a conflict of interest. The General Plan was changed drastically to accommodate the developer's desires, ignoring residents' needs.

The Council violated the recommendation of their own consultant and the Council-appointed citizens committees when it voted this rezoning.

THIS SCHEME WILL COST THE TAXPAYERS MILLIONS. Rubbish disposal has to be moved, street intersections redesigned, businesses relocated, city services put underground, all at prohibitive costs to taxpayers.

ONLY THE DEVELOPERS BENEFIT FROM THIS REZONING. They will sell condominiums at up to $1,000,000.00 each, which the taxpayers will subsidize. They will get city maintained landscaping.

By the Council's own admission, these luxury condominiums will cost the city more to service than revenues they will produce.

Senior Housing is being used as a deceptive cover for this "Enrich the Developers" scheme.

Don't jeopardize our city's future! VOTE NO ON PROPOSITION B.

JOANN RUDEN, President
League of Women Voters of Beverly Hills
BETTY H. HARRIS, Chairperson
Committee to Save Beverly Hills

The alleged libel begins with "Every citizen approved General Plan designated this land to be saved . . ." and ends with with "Senior Housing is being used as a deceptive cover for this 'Enrich the Developers' scheme." The alleged innuendo is that defendants "intended to convey to their readers that [plaintiff] entered into a corrupt and collusive arrangement with a City Councilman which led to the City Council adopting the Zoning Ordinance . . . ."[3] The pleading of falsity, omission of material facts,

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[3]The complete innuendo pleading is as follows: "By publishing the Libelous Statement, defendants Harris, Ruden, and Does 1 through 100, inclusive, intended to convey to their readers that [plaintiff] entered into a corrupt and collusive arrangement with a City Councilman which led to the City Council adopting the Zoning Ordinance which purportedly the Council's consultant and a citizen's committee recommended against adopting; which drastically changed the General Plan unanimously adopted by the public; that would cost the City millions without benefiting the City; which would obligate the City to landscape and provide other services for the condominiums being constructed by [plaintiff]; and that [plaintiff] had provided for senior citizens housing as a deceptive cover to enrich itself."

Apart from the passage concerning "a corrupt and collusive arrangement," even a statement in the innuendo's exact words would not have been libelous in the context of the controversy surrounding the election.

and malice is parallel to that in the second and third causes of action.

Would an ordinary voter understand the ballot argument to mean that plaintiff entered into a "corrupt and collusive arrangement" with a councilman that lead [sic] to adoption of the zoning ordinance? The argument states that the developers (plaintiff) "hired one of our Councilmen, subsequently the Fair Political Practices Commission ruled the Councilman had a conflict of interest." That plaintiff "hired" a councilman conveys no more than they formed a business relationship. What of the FPPC ruling? One of the commission's functions is to issue advisory rulings that concern possible confict of interest involving state or local public officials. Good faith compliance with a ruling is generally a defense against enforcement of civil or criminal sanctions. (Gov. Code, §§ 83114, 878100 [sic] *et seq.*) The fact of a ruling that a councilman had a conflict of interest does not imply that he acted improperly on matters affected by the conflict but only that he was advised against doing so. The ballot argument does not mention bribery or other criminal conduct and does not imply undisclosed knowledge of wrongdoing. Like the letters in the second and third causes, the ballot argument could not reasonably have been interpreted by its probable readers as having a libelous meaning.

SIXTH CAUSE OF ACTION

The sixth cause is for "conspiracy to commit slander." It alleges that defendants Harris, Ruden, Okun, and Does 501 through 600 "conspired to discredit [plaintiff] and destroy its reputation in the community for the purpose of stopping any development by [plaintiff]," that they "did the acts described

in this Sixth Cause of Action in furtherance of the aforesaid conspiracy," and that they "were motivated by malice and ill will toward [plaintiff]." As with the fifth cause, the sufficiency of the sixth depends on whether it alleges actionable wrongdoing.

It purports to do so only by incorporating paragraphs of the fourth cause. The sole misconduct that those paragraphs allege is the making of a "slanderous statement" by "defendants Does 301 through 400." There is no allegation of wrongful conduct by any of the defendant-conspirators—Harris, Ruden, Okun, and Does 501 through 600. Accordingly, the sixth cause fails to state a claim against any defendant.

Though that defect regarding parties requires sustaining the demurrer to the sixth cause, it might not preclude an amendment identifying some individual as both one of the Does 501 through 600 and one of the Does 301 through 400. (See *Marasco* v. *Wadsworth* (1978) 21 Cal.3d 82; *Smeltzley* v. *Nicholson Mfg. Co.* (1977) 18 Cal.3d 932; *Austin* v. *Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596.) Thus we consider whether the fourth cause sufficiently alleges actionable wrongdoing by Does 301 through 400.

The sole purportedly wrongful act charged appears in this allegation: "[Plaintiff] is informed and believes and, based on such information and belief, alleges that within one year last past, defendants Does 301 through 400, inclusive, made the following oral statements (the 'Slanderous Statement'): that [plaintiff] had entered into a corrupt relationship with Councilman Stone, and Stone, pursuant to this arrangement, had improperly influenced the City Planning Commission and staff and the City Council in order to favor [plaintiff] in zoning and land trades with the

City and had unlawfully used his influence as a City Councilman for the private gain of [plaintiff]. Defendants Does 301 through 400, inclusive, made the Slanderous Statement to members of the Beverly Hills community."

By way of innuendo it is alleged that the "Slanderous Statement" was intended and understood to mean that plaintiff "had committed the crimes of bribery and corruption." Falsity and malice are alleged in the same manner as in the second and third causes of ation[sic], except that there is no allegation of omission of material facts.

Defendants contend the allegation of slander is fatally inexact as to time and place of utterance and persons addressed. Yet the pleading does seem certain enough in those respects. Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense. (*Bradley* v. *Hartford Acc. & Indemn. Co.* (1973) 30 Cal.App.3d 818, 825; *Schessler* v. *Keck* (1954) 125 Cal.App.2d 827, 835 (upholding pleading on information and belief).) Nor is the allegation defective for failure to state the exact words of the alleged slander. Notwithstanding an early dictum cited here (*Haub* v. *Friermuth* (1905) 1 Cal.App. 556, 557), we conclude that slander can be charged by alleging the substance of the defamatory statement. (See *Lipman* v. *Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224, 235; *Schessler* v. *Keck, supra*, 125 Cal.App.2d 827, 830 (sustaining allegation of statement that "plaintiff was being treated for syphilis . . . and . . . should not be employed as a cook"); *cf. des Granges* v. *Crall* (1915) 27 Cal.App. 313, 315 (requiring exact pleading of words of libel).)

Might a trier of fact reasonably find that the alleged statement conveyed a slanderous meaning?[4] More particularly, might a "member of the Beverly Hills community" properly be found to understand the statement as charging that plaintiff "had committed the crimes of bribery and corruption"?

The complaint makes clear that the statement was part of the debate over whether the city should permit plaintiff's condominium project.[5] Thus it was in a "setting in which the audience may anticipate efforts . . . to persuade . . . by use of epithets, fiery rhetoric or hyperbole" (*Gregory, supra*, 17 Cal.3d at 601). The vague charge that plaintiff "entered into a corrupt relationship with Councilman Stone" was not a factual assertion of crime but rather an expression of opinion. In context, "corrupt" implied moral criticism of objectives and methods, not the occurrence of bribery. Equally deprecatory words often have been ruled nondefamatory in parallel circumstances. (*Good Government Group of Seal Beach, Inc.* v. *Superior*

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[4]Civil Code section 46 defines slander as follows: "Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; 4. Imputes to him impotence or a want of chastity; or 5. Which, by natural consequence, causes actual damage."

[5]The allegation that the statement was made "within one year last past" encompasses utterances after the referendum of March 9, 1979. However, that referendum dealt only with the zoning ordinance, not the land-exchange agreement; further, the alleged purpose of both the conspiracy to slander and the slander itself was to "stop any development by" plaintiff.

Court, supra, 22 Cal.3d 672, 678, 681 ("chicanery and machinations"); *Gregory, supra*, 17 Cal.3d 596, 599, 603 (labor union officer charged with "seek[ing] personal gain and political prestige rather than [serving] the best interests of the members"); *Desert Sun Publishing Co.* v. *Superior Court, supra*, 97 Cal.App.3d 49 ("chicanery"); *Sierra Breeze* v. *Superior Court, supra*, 86 Cal.App.3d 102 (charge that county supervisor "vote[d] to squander property tax funds"); *Scott* v. *McDonnell Douglas Corp., supra*, 37 Cal.App.3d 277, 284, 288-291 (city manager said to be not "dedicated to efficiently and honestly administer the affairs of the City").)

The charge that "pursuant to this arrangement" Councilman Stone "improperly" and "unlawfully" influenced the city in favor of plaintiff is merely rhetorical hyperbole. "An allegedly defamatory statement may constitute a fact in one context but an opinion in another, depending upon the nature and content of the communication taken as a whole." (*Good Government Group of Seal Beach, Inc.* v. *Superior Court, supra*, 22 Cal.3d 672, 680.) In *Good Government* a statement that city council members "extorted by blackmail $100,000 from [a developer]" was held subject to defamatory interpretation because it described a specific incident and failed to explain that the $100,000 was paid to the city. (*Id.*, at pp. 681, 683.) Here the use of "improperly" and "unlawfully," unadorned by reference to or insinuation of undisclosed knowledge of a particular criminal act, could not be understood to be more than a constitutionally protected expression of severe disapproval of non-criminal conduct.

LEAVE TO AMEND?

On the sustaining of demurrers to the second, third, fifth, and sixth causes of action should plaintiff be given leave to amend? Sufficiency of the second, third, and fifth causes turns on the presence of libel in two letters and a ballot argument. Each of those documents is nonlibelous when read in light of circumstances alleged here that would have to be considered even if omitted from an amended pleading (*Reichert* v. *General Ins. Co.* (1968) 68 Cal.2d 822, 836-837). Accordingly, leave to amend those three causes should be denied because "there are no circumstances under which an amendment would serve any useful purpose" (*Routh* v. *Quinn* (1942) 20 Cal.2d 488, 493-494) and "speedy resolution of cases involving free speech is desirable" to avoid "a chilling effect upon the exercise of First Amendment rights" (*Good Government, supra*, 22 Cal.3d at p. 685).

The sixth cause, on the other hand, turns on the allegedly slanderous nature of an oral statement that is set forth only in substance. Though the statement as presently pleaded could not be found defamatory, the form of the sixth cause does not preclude the possibility of an amendment that would allege slander in furtherance of the conspiracy charged against Okun, Harris, and Ruden. Leave to amend thus should be granted. (*Youngman* v. *Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 245 ("If there is any reasonable possibility that the plaintiff can state a good cause of action, it is error to sustain a demurrer without leave to amend"); *MacLeod* v. *Tribune Publishing Co.* (1959) 52 Cal.2d 536, 542; *Lemoge Electric* v. *County of San Mateo* (1956) 46 Cal.2d 659, 664 ("great liberality should be exercised in permitting a plaintiff to amend").)

Let a peremptory writ issue, directing respondent court (1) to vacate its order overruling petitioners' demurrers to the second, third, fifth, and sixth causes of action, and (2) to issue an order sustaining the demurrers to the second, third, and fifth causes of action without leave to amend and sustaining the demurrers to the sixth cause of action with leave to amend. Petitioners shall recover costs against real party in interest.

NEWMAN, J.

WE CONCUR:
Tobriner, J.
Richardson, J.
*Cologne, J.

*Assigned by the Chairperson of the Judicial Council.

OKUN v. SUPERIOR COURT
L.A. 31341

HARRIS v. SUPERIOR COURT
L.A. 31342

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I concur in the opinion and in the judgment as to the second, third and fifth causes of action, but I dissent from the order permitting leave to amend the sixth cause of action. The further prolongation of this litigation would be as misguided as its origin. (Cal. Const., art. I, § 2; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652.)

The majority conclude that the plaintiffs might possibly identify one of the several hundred Does sued as defendants and thus establish a conspiracy to

slander. I suggest that since plaintiffs have not proposed to further amend their complaint to name any additional defendants at any time after the lawsuit was filed in 1979, an ineluctable conclusion follows that they are unable to do so at this late date.

Defendants filed a general demurrer and it is that general demurrer on which the court is ruling. In many circumstances sustaining a special demurrer might justify a belated opportunity to amend, but we have found, as I read the majority opinion, that no cause of action has been stated. Naming an identifiable live human being in place of a fictitious Doe, even if it can be done, will add nothing to the substance of the complaint.

As I stated recently in my concurring and dissenting opinion in *Deas* v. *Knapp* (1981) 29 Cal.3d 69, 80, there comes a time when the finality of litigation is almost as important as the decision therein. In the preservation of the free exercise of speech, writing and the political function, the early termination of this lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process.

MOSK, J.

WE CONCUR:
BIRD, C.J.
*BROWN, J.

*Assigned by the Chairman of the Judicial Council.

ERWIN OKUN v.
SUPERIOR COURT OF LOS ANGELES COUNTY
L.A. 31341

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IN INTEREST
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BETTY H. HARRIS et al. v.
SUPERIOR COURT OF LOS ANGELES COUNTY
L.A. 31342

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APPENDIX B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date April 24, 1980
Honorable VERNON G. FOSTER
Judge

B.J. SCHNEIDER, Deputy Clerk

NONE Reporter

C 299570

MAPLE PROPERTIES
vs
BETTY H. HARRIS, ETC., ET AL

Counsel for Plaintiff	Levy, Leipziger & Norminton
Counsel for Defendant	Selvin & Weiner for defts Harris & Ruden
	Yusim, Cassidy, Stein & Hanger for deft Erwin Okun
	Richard Posell for Amicus

NATURE OF PROCEEDINGS.

RULING ON SUBMITTED MATTERS

Demurrer of defendants, Betty H. Harris and Joann Ruden, to the First Amended Complaint:

First Cause of Action: Sustained without leave to amend. (C.C.P. 430.10(e)). The complaint shows on its face that this cause of action is barred by the absolute immunity of Civil Code § 47 (2)

Section 47(2) makes absolutely privileged a ". . . publication or broadcast . . . made . . . [i]n any (1) legislative or (2) judicial proceeding . . ." This privilege has been applicable to testimony before a legislative committee (*Kelly* v. *Daro* (1941) 47 C.A. 2d 418, 423) and to the distribution of copies of a letter to a plaintiff from a city councilman during a meeting of the city council. (*Scott* v. *McDonnell Douglas Corp.* (1974) 37 C.A. 3d 277, 285.) In the latter case, the Court of Appeal pointed out that the privilege exists despite malice on the part of a defendant if ". . . the statement which is alleged to be defamatory bears some connection with the work of the legislative body."

The applicability of this privilege has been denied to a notice of intent to circulate a recall petition. (*Gunsul* v. *Ray* (1935) 6 C.A. 2d 528, 530; *Kramer* v. *Ferguson* (1964) 230 C.A. 2d 237, 242.) Although a statement in a recall petition has some resemblance to a statement in a ballot argument in connection with a referendum election, the basis of the decisions in both *Gunsul* and *Kramer* was that Civil Code § 47(2) applies only to the legislative, judicial and similar proceedings.

"Obviously the publication was not had in a legislative or judicial proceeding. A proceeding for a recall is political in its nature . . ." (*Gunsul*, p. 530.)

It has been expressly decided that the power of referendum is the power of legislative action. "The power of referendum is one of the legislative powers specifically reserved by the people in their grant of general legislative power to the legislative bodies representing them. (*Dye* v. *Council of the City of Compton* (1947) 80 C.A. 2d 486, 490.) The process of a ballot argument is a prescribed and integral part of the referendum process. (*Elections Code* §§ 3755, 4015.) To subject those presenting arguments for or against a referendum measure to the threat of civil action for libel would have the same chilling effect on speech as if those testifying before legislative committees were subjected to such civil action. At first glance it may seem inconsistent to grant such immunity to ballot arguments in a referendum proceeding and not to arguments in a recall petition. But generally, recall petitions are directed against a specific individual or individuals, and there exists more likelihood that political enemies may seize upon the opportunity to publish a libel; whereas referendum measures concern legislative actions, and there is less likelihood that an individual or individuals will be the subject of the political dispute.

Second Cause of Action	Demurrers of all defendants. Demurrers overruled.
Third Cause of Action *Fifth Cause of Action* *Sixth Cause of Action*	1. The language alleges is susceptible to the interpretation alleged—that plaintiff participated in acts of bribery of one of the members of the city council, which resulted in council action changing the prior planned use of the exchanged property. 2. The publication is not privileged under Civil Code § 47(2). Although letters to the editor may be concerning a referendum, they are not a part of the referendum process itself, and hence not a part of a legislative proceeding. 3. The publications alleged are conditionally privileged under Civil Code § 47(3); however, each cause of action alleges that the publication was made with malice. The applicability of the privilege is a matter of defense.

Fourth Cause of Action: Demurrers off calendar. No allegations are directed against demurring defendants.

Seventh Cause of Action) *Eighth Cause of Action*)	Demurrers of all defendants (C.C.P. 430.10(e)) Demurrer sustained without leave to amend./ The action taken by defendants and the other citizens of Beverly Hills was the exercise of their fundamental rights to review the action of their legislative body. The court will not examine into their motivations in exercising this right (Cf. *Scott v. McDonnell Douglas Corporation* (1974) 37 C.A. 3d 277, 287 Fn. 9); and in any event the right is too fundamental to permit penalizing its exercise by a civil rights action. (Cf. *Weiss v. Willow Tree Civic Ass'n* (USDC S.D. N.Y. 179) 467 F. Supp. 803, 818-819.)
Ninth Cause of Action) *Tenth Cause of Action*)	Demurrers of all defendants (C.C.P. 430.10(e)) Demurrer sustained without leave to amend./ Effectually, this states no additional cause of action to any pleaded before, except to identify under a different theory the same in-

jury pleaded in CA 2, 3, 5 & 6. To the extent that the injury is alleged to have been caused by the political activities of defendants in seeking to have referendum action, comments under CA 7 & 8 apply. To the extent that these causes of action merely replead defamation and conspiracy to defame causes of action, they are superfluous.

Motions of all defendants to strike punitive damage allegations. Denied.

Thirty days to answer.

Demurring defendants Harris and Ruden to give notice.

A copy of this minute order is sent by US Mail to all counsel above captioned.

APPENDIX C

COURT OF APPEAL—SECOND DIST.
FILED
Jul 28 1980
Clay Robbins, Jr., Clerk

Deputy Clerk

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

ERWIN OKUN, *Petitioner,* *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *Respondent;*	2d Civil No. 59457 (Super. Ct. No. C 299570) ORDER
MAPLE PROPERTIES, A Limited Partnership, *Real Party in Interest.*	

THE COURT:
The petition for writ of mandate, filed May 22, 1980, has been read and considered. The petition is denied.

APPENDIX D

COURT OF APPEAL—SECOND DIST.
FILED
Jul 28 1980
Clay Robbins, Jr., Clerk

Deputy Clerk

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

BETTY H. HARRIS, JOANN RUDEN, *Petitioners,* *v.* SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *Respondent;*	2d Civil No. 59781 (Super. Ct. No. C 299570)
MAPLE PROPERTIES, A Limited Partnership, *Real Party in Interest.*	

THE COURT:
The petition for writ of mandate/prohibition filed June 27, 1980, has been read and considered. The petition is denied.

APPENDIX E

SUPREME COURT
FILED
Jul 15 1981
LAURENCE P. GILL, Clerk

Deputy

ORDER DUE
July 15, 1981

ORDER DENYING REHEARING
L.A. 31341
L.A. No. 31342
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

OKUN, Petitioner
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;
MAPLE PROPERTIES, ETC. Real Party in Interest
(and related case)

Brown, J. (Gerald) and Cologne, J., sitting under assignment

by the Chairperson of the Judicial Council.

..... Petitions for rehearing DENIED.

Bird, C.J., Mosk, J. and Brown, J., would grant the petition of "Harris, Ruden, and Okun," as to the court's action on the sixth cause of action.

s/Bird
Chief Justice

APPENDIX F

ORIGINAL FILED
Dec 18 1979
COUNTY CLERK

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

MAPLE PROPERTIES, a limited partnership,
Plaintiff,
v.
BETTY H. HARRIS, JOANN RUDEN, ERWIN OKUN, and DOES 1 through 1000, inclusive,
Defendants.

No. C 299 570

FIRST AMENDED COMPLAINT FOR:

(1) Libel.
(2) Slander.
(3) Conspiracy to Commit Libel.
(4) Conspiracy to Commit Slander.
(5) Causing Deprivation of Equal Protection of the Laws.
(6) Conspiracy to Cause Deprivation of Equal Protection of the Laws.
(7) Interference With A Prospective Economic Advantage.
(8) Conspiracy to Interfere With a Prospective Economic Advantage.

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Against Defendants Betty H. Harris, Joann Ruden, and Does 1 through 100, Inclusive, For Libel)

1. Plaintiff Maple Properties ("Maple") is now, and at all times material hereto has been, a limited partnership with its principal place of business in the County of Los Angeles, State of California. Maple has complied with the provisions of Section 17900, *et seq.*, of the California Business and Professions Code. Maple is engaged in the business of purchasing, managing, developing and selling real property. Prior to the acts of defendants as set forth in this Complaint, Maple enjoyed a good reputation in the community.

2. Defendants Betty H. Harris ("Harris"), Joann Ruden ("Ruden"), and Erwin Okun ("Okun") are individuals residing within the County of Los Angeles, State of California.

3. Maple does not know the true names of the defendants sued herein as Does 1 through 1000, inclusive.

4. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this First Cause of Action for libel, defendants Does 1 through 100, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

5. In 1977, Maple purchased approximately 10 acres ("Maple's Pre-Exchange Property") in an area of the City of Beverly Hills (the "City") commonly referred to as the industrial zone (the "Area"). At that time, the Area was subject to a building moratorium pending consideration by the City of zoning for the Area. Maple acquired Maple's Pre-Exchange Property with a view to building multi-family condominiums.

6. Maple's Pre-Exchange Property adjoined parcels owned by the City, and property owned by the City adjoined parcels owned by Maple. Prior to the acquisition of Maple's Pre-Exchange Property, Maple discussed at length with City officials the possibility of an exchange of land between them, so that both Maple and the City would own contiguous parcels of land. These discussions successfully concluded on November 28, 1978. On that date, the City Council unanimously adopted Resolution No. 78-R-5922 (the "Exchange Agreement Resolution") approving the said exchange of land, and Maple and the City executed an agreement entitled, "Agreement Between The City Of Beverly Hills And Maple Properties To Exchange Property" (the "Exchange Agreement"). After the Exchange Agreement was executed, and the deeds were exchanged and recorded, Maple owned contiguous parcels of land ("Maple's Property") in the Area.

7. Also on November 28, 1978, the City Council adopted Ordinance No. 78-0-1715 (the "Zoning Ordinance") altering the zoning of the Area to RM-PD, which would allow Maple to build condominiums.

8. The defendants in this action, motivated by ill will toward Maple, have taken action to prevent Maple from making the desired use of Maple's Property in the Area. Subsequent to the passage of the Zoning Ordinance, the defendants, and others, circulated a petition to place on the ballot a ballot measure which would allow the City electorate to reject (or accept) the Zoning Ordinance. Defendants obtained the requisite number of signatures and filed the petition with the City Clerk; said acts by defendants caused the City Council to place on the ballot Proposition B. Passage of Proposition B would result in adoption of the Zoning Ordinance; failure of Proposition B would result in repeal of the Zoning Ordinance. The election (the "Special Municipal Election") was held on March 6, 1979; and Proposition B was defeated.

9. The defendants campaigned against the passage of Proposition B in order to stop Maple's condominium project, among other ways, by defaming Maple. Said defendants variously and falsely accused Maple of corrupt and collusive activities in connection with City officials.

10. In or about February, 1979, prior to the Special Municipal Election, defendants Harris, Ruden, and Does 1 through 100, inclusive, published the following written statement (the "Libelous Statement"):

> "Every citizen approved General Plan designated this land to be saved for municipal and service use. *The developers hired one of our*

Councilmen, subsequently the Fair Political Practices Commission ruled the Councilman had a conflict of interest. The General Plan was changed drastically to accommodate the developers' desires, ignoring residents' needs.

"The Council violated the recommendation of their own consultant and the Council-appointed citizens committees when it voted this rezoning.

THIS SCHEME WILL COST THE TAXPAYERS MILLIONS.

Rubbish disposal has to be moved, street intersections redesigned, businesses relocated, city services put underground, all at prohibitive costs to taxpayers.

ONLY THE DEVELOPERS BENEFIT FROM THIS REZONING.

They will sell condominiums up to $1,000,000.00 each, which the taxpayers will subsidize. They will get city maintained landscaping. By the Council's own admission, these luxury condominiums will cost the city more to service than revenues they will produce.

"Senior Housing is being used as a deceptive cover for this 'Enrich the Developers' scheme." (Emphasis added.)

11. Defendants Harris, Ruden, and Does 1 through 100, inclusive, prepared the Libelous Statement as part of a written "Argument Against Proposition B" (the "Argument") for inclusion in the Sample Ballot and Voter Information Pamphlet of the City (the "Pamphlet"). The Argument was published in the Pamphlet, and the Pamphlet was mailed to all of the

City's registered voters in connection with the Special Municipal Election. A true copy of the Argument is attached as Exhibit "A" and incorporated in this paragraph.

12. The Libelous Statement was made of and concerning Maple as "the developers" and was so understood by those who read it.

13. By publishing the Libelous Statement, defendants Harris, Ruden, and Does 1 through 100, inclusive, intended to convey to their readers that Maple entered into a corrupt and collusive arrangement with a City Councilman which led to the City Council adopting the Zoning Ordinance which purportedly the Council's consultant and a citizen's committee recommended against adopting; which drastically changed the General Plan unanimously adopted by the public; that would cost the City millions without benefiting the City; which would obligate the City to landscape and provide other services for the condominiums being constructed by Maple; and that Maple had provided for senior citizens housing as a deceptive cover to enrich itself. The readers of the Libelous Statement understood it in the foregoing sense, and such understanding on the part of said readers was reasonably drawn from the language of the Libelous Statement.

14. The Libelous Statement, as applied to Maple, is false.

15. Defendants Harris, Ruden, and Does 1 through 100, inclusive, failed to include in the Libelous Statement certain facts known to them, which facts, if included and published in the Libelous Statement, would not have caused the readers of the Libelous Statement to believe that plaintiff had acted as

intimated in the Libelous Statement. Defendants Harris, Ruden and Does 1 through 100, inclusive, made the Libelous Statement either intentionally knowing it was false or with reckless disregard for whether it was true or not, as applied to Maple.

16. Defendants Harris, Ruden, and Does 1 through 100, inclusive, made the Libelous Statement to injure Maple and stop any development by it; said defendants were motivated by malice and ill will toward Maple.

17. As a result of the publication of the Libelous Statement, Maple has suffered a loss of its reputation and is entitled to general damages in the amount of $25,000,000.

18. As a further result of said publication, Maple is not able to develop its condominium project, and, consequently, has suffered special damages in the amount of no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence setting forth the full amount of its damages.

19. As the actions of said defendants, as aforesaid, were taken with malice, Maple, pursuant to California Civil Code Section 3294, is entitled to punitive damages in the amount of $1,000,000.

SECOND CAUSE OF ACTION
(Against Defendants Harris and Does 101 through 200, Inclusive, For Libel)

20. Maple incorporates into this Second Cause of Action paragraphs 1, 2, 3, 5 through 9, inclusive, 17, 18 and 19 of the First Cause of Action.

21. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Second Cause of Action for libel, defendants Does 101 through 200, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

22. On or about January 28, 1979, defendants Harris and Does 101 through 200, inclusive, published the following written statement (the "Libelous Statement"):

"Setting the Record Straight

"The article regarding a controversial land swap between the Beverly Hills City Council and a developer of luxury condommiums [sic] ('Land Swap Stirs Up Beverly Hills' by Sam Kaplan, Dec. 26) missed the point entirely.

"To set the record straight:

"While the area in contention—adjacent to Beverly Hills' civic center—is known as the industrial area, it also houses the city's vital municipal services facilities. It is the site of the city's refuse transfer station, vehicle maintenance garages and all the other indispensable operations that make a city function. It is also the site of a water treatment plant that the city council abandoned in 1976.

"This action was followed by the council's abandoning the city's own water wells in the midst of the recent drought. It was this incredible move that caused a number of citizens to become suspicious of the council's motives. Beverly Hills residents were thus forced to become completely dependent upon one very expensive source of water, that supplied by the Metropolitan Water District of Southern California. Even the MWD's general manager advised the city against this decision.

"Nevertheless, this was done despite the fact that in 1974 the voters of Beverly Hills had passed, by a two-thirds majority, a $3.75 million bond issue to refurbish the city's water wells and treatment facilities. The only council member opposed to the bond issue and retention of the city's wells was Richard Stone, an attorney.

"*Mysteriously*, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were $5 million short. *Amazingly*, a year later the claim went up to $12 million more than the voter-approved bonds. But, without asking the voters again, in December, 1976, the council closed down the wells and sold off the land on which they were located.

"*Not until April 12, 1977, did Richard Stone, at that time the mayor of Beverly Hills, reveal that David Rowen, representing a developer, had become a client of Stone's. The abandoned treatment plant is now earmarked for the developers in a landswap deal.*" (Emphasis added.)

23. Defendants Harris and Does 101 through 200, inclusive, prepared the Libelous Statement as a letter to the Editor of the *Los Angeles Times*, and the letter was published on January 28, 1979, in the "View" section of the *Los Angeles Times*. A true copy of this letter is attached as Exhibit "B" and incorporated in this paragraph.

24. The Libelous Statement was made of and concerning Maple as the "developer" and was so understood by those who read it.

25. By publishing the Libelous Statement, defendants Harris and Does 101 through 200, inclusive, intended to convey to their readers that Maple had (a) conspired for a period of years with Councilman Stone to cause the City to abandon its water well system in order to make the water treatment plant obsolete and allow Maple to acquire the property on which the water treatment plant was located for Maple's private gain and (b) conspired to commit, and did commit, the crimes of bribery and corruption. The readers of the Libelous Statement understood it in the foregoing sense, and such understanding on the part of said readers was reasonably drawn from the language of the Libelous Statement.

26. The Libelous Statement, as applied to Maple, is false.

27. Defendants Harris and Does 101 through 200, inclusive, failed to include in the Libelous Statement certain facts known to them, which facts, if included and published in the Libelous Statement, would not have caused the readers of the Libelous Statement to believe that plaintiff had acted as intimated in the Libelous Statement. Defendants Harris and Does 1 through 200, inclusive, made the Libelous Statement

either intentionally knowing it was false or with reckless disregard for whether it was true or not, as applied to Maple.

28. Defendants Harris and Does 101 through 200, inclusive, made the Libelous Statement to injure Maple and stop any development by it; said defendants were motivated by malice and ill will toward Maple.

THIRD CAUSE OF ACTION
(Against Defendants Erwin Okun and Does 201 through 300, Inclusive, For Libel)

29. Maple incorporates into this Third Cause of Action paragraphs 1, 2, 3, 5 through 9, inclusive, 17, 18 and 19 of the First Cause of Action.

30. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Third Cause of Action for libel, defendants Does 201 through 300, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

31. On or about October 13, 1978, defendants Okun and Does 201 through 300, inclusive, published the following written statement (the "Libelous Statement").

> "The entire industrial zone scenario reads uncomfortably like a John D. MacDonald novel of Florida land wheeler-dealers mired up to their necks in deception of the public.
>
> "One of our elected officials has already disqualified himself from voting because of real or potential conflict of interest.
>
> "You [Mayor Tilem] have now exhibited prejudice publicly to those in opposition and should disqualify yourself.

"One of the three councilmembers left is a real estate developer, obviously sympathetic to fellow builders and realtors, though he has no business interests in the city.

"That leaves two, and we elected five to the council to represent us.

"Isn't it time to remove the clouds of suspicion, innuendo, rumor, secret talks and shrouded negotiation and return the matter to the people in the form of a referendum?"

32. The Libelous Statement was contained in an open letter to Mayor Tilem published by the *Beverly Hills Courier* on or about October 13, 1978; a true copy is attached as Exhibit "C" and incorporated in this paragraph.

33. The Libelous Statement was made of and concerning Maple as the "Florida land wheeler-dealers" and was so understood by those who read it. The John D. MacDonald novel referred to in the Libelous Statement is entitled *Condominium*. *Condominium* is about a fictional company, the Marliss Corporation, which bribes public officials and engages in other illegal activities so that it can build dangerously defective buildings.

34. By publishing the Libelous Statement, defendants Okun and Does 201 through 300, inclusive, intended to convey to their readers that Maple was engaging in illegal and collusive activities similar to those of the Marliss Corporation in *Condominium*. The readers of the Libelous Statement so understood it in the foregoing sense, and such understanding on the part of said readers was reasonably drawn from the language of the Libelous Statement.

35. The Libelous Statement, as applied to Maple, is false.

36. Defendants Okun and Does 201 through 300, inclusive, failed to include in the Libelous Statement facts known to them, which facts, if included and published in the Libelous Statement, would not have caused the readers of the Libelous Statement to believe that plaintiff had acted as intimated in the Libelous Statement. Defendants Okun and Does 201 through 300, inclusive, made the Libelous Statement either intentionally knowing it was false or with reckless disregard for whether it was true or not, as applied to Maple.

37. Defendants Okun and Does 201 through 300, inclusive, made the Libelous Statement to injure Maple and stop any development by it; said defendants were motivated by malice and ill will toward Maple.

FOURTH CAUSE OF ACTION
(Against Defendants Does 301 through 400, Inclusive, For Slander)

38. Maple incorporates into this Fourth Cause of Action paragraphs 1, 2, 3, and 5 through 9, inclusive, of the First Cause of Action.

39. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Fourth Cause of Action for slander, defendants Does 301 through 400, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

40. Maple is informed and believes and, based on such information and belief, alleges that within one year last past, defendants Does 301 through 400,

inclusive, made the following oral statement (the "Slanderous Statement"): that Maple had entered into a corrupt relationship with Councilman Stone, and Stone, pursuant to this arrangement, had improperly influenced the City Planning Commission and staff and the City Council in order to favor Maple in zoning and land trades with the City and had unlawfully used his influence as a City Councilman for the private gain of Maple. Defendants Does 301 through 400, inclusive, made the Slanderous Statement to members of the Beverly Hills community.

41. By making the Slanderous Statement, defendants Does 301 through 400, inclusive, intended to convey to their listeners that Maple had committed the crimes of bribery and corruption. The Slanderous Statement was understood by those who heard it to mean that Maple had committed the crimes of bribery and corruption, and such understanding on the part of said listeners was reasonably drawn from the words of the Slanderous Statement.

42. The Slanderous Statement is false.

43. Defendants Does 301 through 400, inclusive, made the Slanderous Statement either intentionally knowing it was false or with reckless disregard for whether it was true or not.

44. Defendants Does 301 through 400, inclusive, made the Slanderous Statement to injure Maple and stop any development by it; said defendants were motivated by malice and ill will toward Maple.

45. As a result of the publication of the Slanderous Statement, Maple has suffered a loss of its reputation and is entitled to general damages in the amount of $25,000,000.

46. As a further result of said publication, Maple is not able to develop its condominium project, and, consequently, has suffered special damages in the amount of no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence setting forth the full amount of its damages.

47. As the actions of said defendants, as aforesaid, were taken with malice, Maple, pursuant to California Civil Code Section 3294, is entitled to punitive damages in the amount of $1,000,000.

FIFTH CAUSE OF ACTION

(Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun and Does 401 through 500, Inclusive, For Conspiracy to Commit Libel)

48. Maple incorporates into this Fifth Cause of Action paragraphs 1, 2, 3, 5 through 16, inclusive, of the First Cause of Action, 22 through 28, inclusive, of the Second Cause of Action, and 31 through 37, inclusive, of the Third Cause of Action.

49. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Fifth Cause of Action for conspiracy to commit libel, defendants Does 401 through 500, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

50. In or about January, 1978, and continuing to the present time, defendants Harris, Ruden, Okun, and Does 401 through 500, inclusive, knowingly and willfully conspired to discredit Maple and destroy its reputation in the community for the purpose of stopping any development by Maple.

51. Defendants Harris, Ruden, Okun, and Does 401 through 500, inclusive, did the acts described in this Fifth Cause of Action in furtherance of the aforesaid conspiracy; said defendants were motivated by malice and ill will toward Maple.

52. As a result of said conspiracy, Maple has suffered a loss of its reputation and is entitled to general damages in the amount of $25,000,000.

53. As a further result of said conspiracy, Maple is not able to develop its condominium project, and, consequently, has suffered special damages in the amount of no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence setting forth the full amount of its damages.

54. As the actions of said defendants, as aforesaid, were taken with malice, Maple, pursuant to California Civil Code Section 3294, is entitled to punitive damages in the amount of $1,000,000.

SIXTH CAUSE OF ACTION

(Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun and Does 501 through 600, Inclusive, For Conspiracy to Commit Slander)

55. Maple incorporates into this Sixth Cause of Action paragraphs 1, 2, 3, and 5 through 9, inclusive, of the First Cause of Action, 40 through 44, inclusive, of the Fourth Cause of Action, and 52, 53 and of 54 the Fifth Cause of Action.

56. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Sixth Cause of Action for conspiracy to commit slander, defendants Does 501 through 600, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

57. In or about January, 1978, and continuing to the present time, defendants Harris, Ruden, Okun, and Does 501 through 600, inclusive, knowingly and willfully conspired to discredit Maple and destroy its reputation in the community for the purpose of stopping any development by Maple.

58. Defendants Harris, Ruden, Okun, and Does 501 through 600, inclusive, did the acts described in this Sixth Cause of Action in furtherance of the aforesaid conspiracy; said defendants were motivated by malice and ill will toward Maple.

SEVENTH CAUSE OF ACTION

Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun, and Does 601 through 700, Inclusive, For Causing Deprivation of Equal Protection of the Laws)

59. Maple incorporates into this Seventh Cause of Action paragraphs 1, 2, 3, and 5 through 17, inclusive, of the First Cause of Action, 22 through 28, inclusive,

of the Second Cause of Action, 31 through 37, inclusive, of the Third Cause of Action, 40 through 44, inclusive, of the Fourth Cause of Action, 50 and 51 of the Fifth Cause of Action, and 57 and 58 of the Sixth Cause of Action.

60. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Seventh Cause of Action for causing deprivation of equal protection under the laws, defendants Does 601 through 700, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

61. Maple's right of action against defendants Harris, Ruden, Okun and Does 601 through 700, inclusive, is authorized by 42 U.S.C. Section 1983, commonly known as the Civil Rights Act of 1871.

62. Commencing in or about November, 1978, and continuing to the time of this Complaint, defendants Harris, Ruden, Okun, and Does 601 through 700, inclusive, have sought to deprive, and have deprived Maple of equal protection of the laws guaranteed to it by the United States Constitution as a result of the following acts:

(a) Taking steps, as aforesaid, to cause to be placed on the City ballot, Proposition B, for the purpose of stopping Maple's condominium project; and

(b) Successfully campaigning, as aforesaid, against the passage of Proposition B, among other ways, by defaming Maple.

63. Maple's limited partners include limited partners who are not citizens of the United States. The actions of defendants Harris, Ruden, Okun, and Does 601 through 700, inclusive, as aforesaid, were motivated,

in principal part, by a discriminatory animus toward Maple's limited partners, as members of the class of aliens (*i.e.*, Iranians). The purpose of said actions, including the passage [sic][1] of Proposition B, was to deprive said aliens of the desired use of their property.

64. In causing Maple to be deprived of equal protection of the laws, defendants Harris, Ruden, Okun, and Does 601 through 700, inclusive, acted under color of law provided to them by the State of California in the California Election Code.

65. As a proximate result of their actions, as aforesaid, defendants Harris, Ruden, Okun, and Does 601 through 700, inclusive, have caused Maple damage in the amount of no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence setting forth the full amount of its damages.

66. The actions of said defendants, as aforesaid, were motivated by malice and ill will toward Maple. Accordingly, Maple is entitled to punitive damages in the amount of $1,000,000.

---

[1]Pursuant to a subsequent stipulation executed by counsel for the parties, the word "passage" was deleted and the word "defeat" was substituted.

EIGHTH CAUSE OF ACTION

(Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun, and Does 701 through 800, Inclusive, For Conspiracy to Cause Deprivation of Equal Protection of the Laws)

67. Maple incorporates into this Eighth Cause of Action paragraphs 1, 2, 3, and 5 through 17, inclusive, of the First Cause of Action, 22 through 28, inclusive, of the Second Cause of Action, 31 through 37, inclusive, of the Third Cause of Action, 40 through 44, inclusive, of the Fourth Cause of Action, 50 and 51 of the Fifth Cause of Action, 57 and 58 of the Sixth Cause of Action, and 63, 64, 65 and 66 of the Seventh Cause of Action.

68. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Eighth Cause of Action for conspiracy to cause deprivation of equal protection of the laws, defendants Does 701 through 800, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

69. Maple's right of action against the defendants is authorized by 42 U.S.C. Section 1985(3), commonly known as the Civil Rights Act of 1871.

70. In or about January, 1978, defendants, and each of them, knowingly and willfully conspired among themselves to prevent the development of Maple's condominium project. As part of defendants' conspiracy, defendants agreed to act in concert to place on the City ballot a ballot measure for the purpose of repealing the Ordinance.

71. Defendants Harris, Ruden, Okun, and Does 701 through 800, inclusive, furthered said conspiracy as the result of the following acts:

(a) Taking steps, as aforesaid, to cause to be placed on the City ballot, Proposition B, for the purpose of stopping Maple's condominium project; and

(b) Successfully campaigning, as aforesaid, against the passage of Proposition B, among other ways, by defaming Maple.

NINTH CAUSE OF ACTION

(Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun, and Does 801 through 900, Inclusive, For Interference With a Prospective Economic Advantage)

72. Maple incorporates into this Ninth Cause of Action paragraphs 1, 2, 3, and 5 through 17, inclusive, of the First Cause of Action, 22 through 28, inclusive, of the Second Cause of Action, 31 through 37, inclusive, of the Third Cause of Action, 40 through 44, inclusive, of the Fourth Cause of Action, 50 and 51 of the Fifth Cause of Action, and 57 and 58 of the Sixth Cause of Action.

73. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Ninth Cause of Action for interference with a prospective economic advantage, defendants Does 801 through 900, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

74. The enactment of the Ordinance constituted a prospective economic advantage for Maple in that, among other things, it allowed Maple to develop Maple's Property in the manner it desired, which was the construction of residential condominiums.

75. At all times material hereto, defendants Harris, Ruden, Okun, and Does 801 through 900, inclusive, had knowledge of Maple's prospective economic ad-

vantage under the Ordinance and intended to interfere with it.

76. Defendants Harris, Ruden, Okun, and Does 801 through 900, inclusive, intentionally interfered with Maple's prospective economic advantage under the Ordinance by, among other things, committing the acts of defamation alleged herein. Plaintiff is informed and believes, and based upon such information and belief alleges, that the intentional interference of defendants Harris, Ruden, Okun, and Does 801 through 900, inclusive, with Maple's prospective economic advantage, as alleged herein, proximately caused the passage [sic][2] of Proposition B.

77. As a proximate result of the interference by defendants Harris, Ruden, Okun, and Does 801 through 900, inclusive, of the prospective economic advantage of Maple, as aforesaid, Maple has suffered damages in the amount of no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence setting forth the full amount of its damages.

78. Defendants Harris, Ruden, Okun, and Does 801 through 900, inclusive, intentionally interfered with

---

[2]*See* note 1 *supra*.

a prospective economic advantage of Maple for the purpose of harming Maple; said defendants were motivated by malice and ill will toward Maple. Therefore, pursuant to California Civil Code Section 3294, Maple is entitled to punitive damages in the amount of $1,000,000.

TENTH CAUSE OF ACTION
(Against Defendants Betty H. Harris, Joann Ruden, Erwin Okun, and Does 901 through 1000, Inclusive, For Conspiracy to Interfere With A Prospective Economic Advantage)

79. Maple incorporates into this Tenth Cause of Action paragraphs 1, 2, 3, and 5 through 17, inclusive, of the First Cause of Action, 22 through 28, inclusive, of the Second Cause of Action, 31 through 37, inclusive, of the Third Cause of Action, 40 through 44, inclusive, of the Fourth Cause of Action, 50 and 51 of the Fifth Cause of Action, 57 and 58 of the Sixth Cause of Action, and 74 through 76, inclusive, of the Ninth Cause of Action.

80. Maple is informed and believes, and on that basis alleges, that in doing the acts which constitute this Tenth Cause of Action for conspiracy to interfere with a prospective economic advantage, defendants Does 901 through 1000, inclusive, were the agents, employees, partners or joint venturers of each other defendant.

81. In or about July, 1978, and continuing to the time of this Complaint defendants Harris, Ruden, Okun, and Does 901 through 1000, inclusive, knowingly and willfully conspired to interfere with a prospective economic advantage of Maple.

82. Defendants Harris, Ruden, Okun, and Does 901 through 1000, inclusive, did the acts herein alleged pursuant to, and in furtherance of, their conspiracy.

83. As a proximate result of said conspiracy, Maple has suffered damages in an amount no less than $37,555,000 as follows:

(a) Lost profits of no less than $36,000,000;

(b) Development costs of no less than $1,350,000;

(c) Net operating loss from managing and holding Maple's Property of no less than $200,000; and

(d) Monies expended as a result of the actions of defendants, as aforesaid, of no less than $5,000.

Maple will, at the time of trial, introduce evidence to set forth the full amount of its damages.

84. As the actions of said defendants were taken with malice and ill will toward Maple, Maple, pursuant to California Civil Code Section 3294, is entitled to punitive damages in the amount of $1,000,000.

WHEREFORE, Maple prays for judgment as follows:

1. On the First through the Sixth Causes of Action, inclusive, general damages in the amount of $25,000,000.

2. On all Causes of Action:

(a) Special damages in an amount according to proof, but in no event less than $37,555,000.

(b) Punitive damages in the amount of $1,000,000.

(c) Costs of suit incurred in this action.

(d) Such other and further relief as the Court deems just and proper in the premises.

DATED: December 18, 1979

LEVY, LEIPZIGER & NORMINTON
A Professional Law Corporation
CHARLES M. LEVY
THOMAS M. NORMINTON

By s/Charles M. Levy (tmn)
Charles M. Levy
Attorneys for Plaintiff

ARGUMENT AGAINST PROPOSITION B

Beverly Hills has only one Industrial Area to sustain us as an independent city. *We must keep it for our community needs and not allow it to be zoned away.*

Vote NO on Proposition B.

We need a place for police cars, carpentry and paint shops, city truck maintenance, park equipment, trash disposal, water facilities and other lifeline services essential to our community.

These indispensable city services enable Beverly Hills to operate efficiently and at low cost. They must be contained in the Industrial Area for they are unpleasant neighbors. *We cannot afford to allow developers to take over the only suitable location within our city for these vital needs.*

Every citizen approved General Plan designated this land to be saved for municipal and service use. The developers hired one of our Councilmen, subsequently the Fair Political Practices Commission ruled the Councilman had a conflict of interest. The General Plan was changed drastically to accommodate the developer's desires, ignoring residents' needs.

The Council violated the recommendation of their own consultant and the Council-appointed citizens committees when it voted this rezoning.

THIS SCHEME WILL COST THE TAXPAYERS MILLIONS. Rubbish disposal has to be moved, street intersections redesigned, businesses relocated, city services put underground, all at prohibitive costs to taxpayers.

EXHIBIT A

ONLY THE DEVELOPERS BENEFIT FROM THIS REZONING. They will sell condominiums at up to $1,000,000,000 each, which the taxpayers will subsidize. They will get city maintained landscaping. By the Council's own admission, these luxury condominiums will cost the city more to service than revenues they will produce.

Senior Housing is being used as a deceptive cover for this "Enrich the Developers" scheme.

Don't jeopardize our city's future!
VOTE NO ON PROPOSITION B.

JOANN RUDEN, President
League of Women Voters of Beverly Hills

BETTY H. HARRIS, Chairperson Committee to Save Beverly Hills

LETTERS

Setting the Record Straight

The article regarding a controversial land swap between the Beverly Hills City Council and a developer of luxury condominiums ("Land Swap Stirs Up Beverly Hills" by Sam Kaplan, Dec. 20) missed the point entirely.

To set the record straight:

While the area in contention—adjacent to Beverly Hills civic center—is known as the industrial area. It also houses the city's vital municipal services facilities. It is the site of the city's refuse transfer station, vehicle maintenance garages and all the other indispensable operations that make a city function. It is also the site of a water treatment plant that the city council abandoned in 1976.

This action was followed by the council's abandoning the city's own water wells in the midst of the recent drought. It was this incredible move that caused a number of citizens to become suspicious of the council's motives. Beverly Hills residents were thus forced to become completely dependent upon one very expensive source of water, that supplied by the Metropolitan Water District of Southern California. Even the MWQD's general manager advised the city against this decision.

Nevertheless, this was done despite the fact that in 1974 the voters of Beverly Hills had passed, by a two-thirds majority, a $3.75-million bond issue to refurbish the city's water wells and treatment facilities. The only council member opposed to the bond

issue and retention of the city's wells was Richard Stone, an attorney.

Mysteriously, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were $5 million short. Amazingly, a year later the claim went up to $12 million more than the voter-approved bonds. But, without asking the voters again, in December, 1976, the council closed down the wells and sold off the land on which they were located.

Not until April 12, 1977, did Richard Stone, at that time the mayor of Beverly Hills, reveal that David Rowen, representing a developer, had become a client of Stone's. The abandoned treatment plant is now earmarked for the developers in a land-swap deal.

BETTY H. HARRIS
Beverly Hills

LETTERS TO THE EDITOR

Let People Decide

Attached is an open letter to the Mayor on the matter of the industrial zone.

Any space you can make available for it would be greatly appreciated.

Erwin Okun
S. Rodeo Dr.
Beverly Hills

(*Following is Mr. Okun's letter to Beverly Hills Mayor Joseph N. Tilem*—Ed.)

Dear Mayor Tilem:

I strongly object to your recent public statements describing the opposition to the industrial zone development plans as "a dozen ladies and that's all they are."

Your remarks are insulting, condescending, arrogant and totally without merit. There's also a bit of male chauvinism lurking there.

The number of residents opposed to the plans are far greater than a dozen, including men and women, who care deeply about the future independence of this city.

If the "dozen" you are referring to are the individuals who have addressed the council on the zoning matter, you are putting down some very fine, dedicated people, including several elected representatives of civic and community-action groups. They speak for far more than themselves.

EXHIBIT C

Their only vested interest is the well-being, integrity and continued viability of our city.

But who speaks publicly in defense of the plan?

The developer's banker, the developer's contractor, the developer's advertising man, the developer's sales agent, the developer's etc.

You have also stated that you "would certainly never sign papers to trade away land that we need." But what else are you doing if you proceed with this plan?

The "dozen ladies" and others keep asking the same pertinent, valid questions that, if answered, could put all arguments to rest.

However, only evasive, obtuse and hardly reassuring responses come back.

—Where will our municipal services go?

—Why should the city incur enormous costs to move them?

—Are we going to become a contract city, beholden to outside vendors?

—Where will our water come from when we are totally at the mercy of the MWD and rates treble and we are in a drought worse than the recent one?

—Why are we trading land when we should be buying -like other cities that are land-banking for the future?

But the even larger question is who will gain from this plan? The majority of residents, or the very few individuals with a vested interest in the condominium project?

And what about all the ambiguous promises to the senior citizens? The 100-unit housing promise is a blatant, political carrot in return for their dedicated support.

Can you honestly tell the folks there really will be such a building for them exclusively? What will the costs be? $300 a month? $650? Who will determine those with highest priority? How can you restrict entry to city residents only, if state and federal money is involved? And what about the hundreds and hundreds of needy, Beverly Hills seniors who will be left out?

The entire industrial zone scenario reads uncomfortably like a John D. MacDonald novel of Florida land wheeler-dealers mired up to their necks in deception of the public.

One of our elected officials has already disqualified himself from voting because of real or potential conflict of interest.

You have now exhibited prejudice publicly to those in opposition and should disqualify yourself.

One of the three councilmembers left is a real estate developer, obviously sympathetic to fellow builders and realtors, though he has no business interests in the city.

That leaves two, and we elected five to the council to represent us.

Isn't it time to remove the clouds of suspicion, innuendo, rumor, secret talks and shrouded negotiation and return the matter to the people in the form of a referendum?

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned, say:

I have read the foregoing First Amended Complaint and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am ☒ an officer ☐ a partner _____ ☒ a Vice President of Pacific Triangle Management Corporation, general partner of Maple Properties, a limited partnership a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on December 14, 1979, at Beverly Hills, California.

I declare under penalty of perjury that the foregoing is true and correct.

s/David H. Rowen

DAVID H. ROWEN

ACKNOWLEGMENT OF RECEIPT OF DOCUMENT
(other than summons and complaint)

Received copy of document described as _____

_____

on _____ 19____.

_____

(Signature)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 433 North Camden Drive, Suite 1200, Beverly Hills, CA 90210

On December 18, 1979, I served the foregoing document described as FIRST AMENDED COMPLAINT on interested party in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Beverly Hills, CA 90210 addressed as follows:

Paul Selvin Esq.
Selvin & Weiner
1900 Avenue of the Stars, #2400
Los Angeles, CA 90067

Alice Huston, Esq.
Yusim, Cassidy, Stein & Hanger
8383 Wilshire Blvd., #330
Beverly Hills, CA 90211

Executed on December 18, 1979 at Beverly Hills, California.

(check applicable paragraph below)

☒ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

s/Cynthia Avila

CYNTHIA AVILA

Opposition

No. 81-719

IN THE

Supreme Court of the United States

October Term, 1981

Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

MAPLE PROPERTIES,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

(BETTY H. HARRIS, JOANN RUDEN, and ERWIN OKUN,

Real Parties in Interest.)

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

REAL PARTIES IN INTEREST BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 81-719

IN THE

Supreme Court of the United States

October Term, 1981

MAPLE PROPERTIES,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

(BETTY H. HARRIS, JOANN RUDEN, and ERWIN OKUN,

Real Parties in Interest.)

REAL PARTIES IN INTEREST BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The real parties in interest, Betty H. Harris, Joann Ruden and Erwin Okun, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of California. That opinion is reported at 29 Cal.3d 442, 629 P.2d 1369,175 Cal.Rptr. 157 and is Appendix A in the Appendix filed with the petition.

The procedural posture and the opinion of the California Supreme Court both show that this case cannot qualify for review by certiorari. 28 USC 1257; U.S. Supreme Court Rule 19.

INTRODUCTION.

The intemperate language of the Petition (*e.g.*, "protecting calculated liars," "conspiratorial character assassination", Petition pp. 20 and 21) should not be permitted to obscure what this case is really about.

Real parties Harris, Ruden and Okun are defendants in an action for defamation and other alleged torts in which Petitioner, Maple Properties, a real estate developer (hereafter simply "Maple"), seeks over $63,000,000 damages from 1,000 citizens of the City of Beverly Hills. The suit is based on publications made during a referendum campaign. The voters overwhelmingly rejected a zoning change and a proposed agreement between Maple and the city whereby Maple would have been enabled to build luxury condominiums. Maple's Complaint is in ten counts. Appendix F, pp. 41-72. The three printed publications which allegedly defamed Maple are at Appendix pp. 66-72.

The trial court sustained defendants' demurrers to five causes without giving Maple leave to amend. (Those alleged causes were: 1. Libel by printed ballot argument; 7. deprivation of equal protection of law; 8. conspiracy to deprive of equal protection of the law; 9. interference with prospective economic advantage; 10. conspiracy to interfere with prospective economic advantage. None of these are now before this Court). The trial court overruled the demurrers as to four alleged causes (2. libel by Mrs. Harris's letter; 3. libel by Mr. Okun's letter; 5. conspiracy to libel; 6. conspiracy to slander) and placed the demurrer off calendar as to one cause; (4. alleged slander). The defendants as petitioners on a writ of mandate in the California Supreme Court obtained an order requiring sustaining of their demurrers without leave to amend to the libel and conspiracy to libel causes (nos. 2, 3, and 5), but the Supreme Court granted Maple leave to amend its slander and conspiracy

to slander causes.[1] Plaintiff Maple is now the petitioner here.

The case is purely one of a state court decision on defamation in the political arena, without any racial connotations.[2]

It takes but a glance at the publications (a short ballot argument and two letters to the editor) to see that none of them is defamatory. Further, their charge of conflict of interest is true, and the truth was in the record before the California Supreme Court.[3]

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[1]See our point I below. No trial has been had. The matter has not been dismissed and is before the Los Angeles Superior Court.

[2]Despite the statement in the Petition (p. 2), there is not a word in the publications or in the causes for defamation which refers to "alien Iranians" or to defendants' alleged hatred of them.

[3]Ninety-nine percent of the content of the publications is critical of actions of the governing body of Beverly Hills and cannot support an action of defamation. See, *e.g., New York Times v. Sullivan,* (1964) 376 U.S. 254 at 292, and footnote 1 in *Okun v. Superior Court,* (1981) 29 Cal.3d 442 at 452, Appendix p. 10. The truth of the sentences (that Maple had employed Stone, the mayor) of which Maple complains the most (although the sentences in the context are not defamatory) was before the California Supreme Court, by virtue of judicial notice and Maple's responses to written interrogatories. See California C.C.P. §430.30; *Chavez v. Times Mirror* (1921), 185 Cal. 20, 23, 195 Pac. 666; *Forsher v. Bugliosi* (1980), 26 Cal.3d 792, 812, footnote 8; 163 Cal.Rptr. 628, 608 P.2d 716; *Able v. Van Der Zee* (1967), 256 Cal.App.2d 728, 734, 64 Cal.Rptr. 481; 3 Witkin, Cal. Procedure 1996, 2nd Ed.

The California Supreme Court was apprised that the California Fair Political Practices Commission had advised the City that Stone had a conflict of interest under the California statutes; that the citizens of Beverly Hills had twice by overwhelming vote rejected the zoning change and the agreement between Maple and the City Council; and of Maple's admission that it had hired Stone as its attorney.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

1. There Is No Final Judgment or Decree.

Certiorari under 28 U.S.C. 1257 is available where "final judgments or decrees" have been rendered. No such judgment or decree has been entered in this case. The majority opinion of the California Supreme Court concludes as follows:

> "Let a peremptory writ issue, directing respondent [Los Angeles Superior] court (1) to vacate its order overruling petitioners' [Harris, Ruden and Okun] demurrers to the second, third, fifth, and sixth causes of action, and (2) to issue an order sustaining the demurrers to the second, third, and fifth causes of action without leave to amend and sustaining the demurrers to the sixth cause of action with leave to amend. Petitioners shall recover costs against real party in interest [Maple]."[4]

The order of the California Supreme Court is not "final" within the meaning of 28 U.S.C. 1257, as no final judgment has yet been entered in the case. An order sustaining a demurrer, especially where other causes of action still remain to be decided, is not a final judgment in California. *Lavine v. Jessup*, (1957) 48 Cal.2d 611, 614, 311 P.2d 8; *Parenti v. Lifeline Blood Bank*, (1975) 49 Cal.App.3d 331, 334, 122 Cal.Rptr. 709; *American National Insurance Co. v. Yee Lim Shee*, (9th Cir. 1939) 104 F.2d 688, 693, cert. den. 308 U.S. 592, 84 L.Ed. 495 (1939).

A judgment "should be final not only as to all the parties, but as to the whole subject matter and as to all the causes

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[4]The disposition of the second, third and fifth causes of action by the Supreme Court is identical with the order of the trial court as to the seventh, eighth, ninth and tenth causes of actions: "Demurrer sustained without leave to amend." (Appendix B, p. 31) None of the trial court's order was a final judgment and the order was not appealable.

of action involved." *Collings v. Miller*, 252 U.S. 364, 370, 64 L.Ed. 616, 40 S.Ct. 347; and see *Arnold v. United States*, 263 U.S. 427, 434, 68 L.Ed. 371, 445 S.Ct. 144. This case is a millennium away from being final: Maple is still to amend its complaint, trial is still to be had, judgment is still to be entered.

2. No Federal Right Has Been Specially Claimed Under the U.S. Constitution by Maple.

Under 28 U.S.C. 1257(3) a writ of certiorari is available "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." It takes but a glance at Maple's First Amended Complaint to see that each of the second, third, and fifth causes of action (Appendix F, pp. 48-56) pleads simply a cause of action for defamation under California law. There is not a word that any title, right, privilege or immunity is claimed under the U.S. Constitution, and there is nothing in the opinion of the California Supreme Court that it has passed on any such constitutional issue. Under these circumstances, a writ of certiorari is clearly inappropriate and unavailable.[5] *Black v. Cutter Laboratories*, (1956) 351 U.S. 292, 298-300, 76 S.Ct. 824, 100 L.Ed. 1188, rehear. den. 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed. 69; *Oxley Stave Co. v. Butler County*, (1897) 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 709.

3. The Opinion of the California Supreme Court Decides Only a Question of State Law.

The California Supreme Court unanimously holds that under applicable California law the three printed publications of which Maple complains will not support an action

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[5]As petitioner itself admits, the seventh and eighth causes in the First Amended Complaint which allege deprivation of equal protection of the law "are not before this Court." (Petition, p. 5).

for defamation. This raises no federal question, and certainly none of substance within the meaning of Rule 19. As this Court recently stated:

> "The appellants' objection to the State Supreme Court's application of state law does not raise a federal question appropriate for review by this Court. See *Patterson v. Colorado*, 205 U.S. 454, 51 L.Ed. 879, 27 S.Ct. 556 (1907)" *Agins v. Tiburon* (447 U.S. 235, 259, 65 L.Ed.2d 106, 111, 100 S.Ct. 2138 (1981), footnote 6.

Article I Sec. 2 of the California Constitution[6] and the many California cases cited by the California Supreme Court provide a state foundation for the opinion without reference to the First Amendment. This Court has specifically held that California may construe its own constitutional provisions and give even broader protection to free speech than the First Amendment. *Robins v. Pruneyard Shopping Center*, (1979) 23 Cal.3d 899, aff'd. 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).[7]

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[6]Article I, Sec. 2 of the California Constitution is as follows:

> "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[7]The opinion of the California Supreme Court mentions the First Amendment once: "*Gregory* [17 Cal.3d 596, 131 Cal.Rptr. 641, 552 P.2d 425] also confirms that, short of accusations of crime or personal dishonesty the First Amendment protects even sharp attacks on the character, motives or moral qualifications of 'a public officer or . . . an active participant in a labor dispute . . .' " (29 Cal.3d at 451, Appendix p. 8) The statement, of course, is accurate. Real parties' constitutional arguments to the California Supreme Court included that California Constitution Art. 1, Sec. 2, provides broader protection to political speech than the First Amendment. (Replication of Harris, et al., p. 14, filed Dec. 5, 1980 in California Supreme Court.) At root the opinion of the California Supreme Court rests on that Court's reading of a publication issued in a heated political campaign and on an interpretation of that state's defamation and pleading statutes. That reading and interpretation raise no constitutional issues here.

At page 18 of its petition, Maple attempts to draw some succor from Justice White's dissenting opinion in *Gertz*. But that opinion also is clearly based upon the premise that it is for the individual states, and not the federal courts, to determine their own substantive law of defamation.[8]

The opinion of the California Supreme Court in fact is not only consistent with but is mandated by the opinions of this Court: *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Greenbelt Pub. Assn. v. Bresler*, (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6; *New York Times Co. v. Sullivan*, (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; *Garrison v. State of Louisiana*, (1964) 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125. No federal question, and certainly no substantial federal question, is raised.

4. It Is Simply Not the Case That "Several Constitutionally Protected Fundamental Rights" Are Undermined by the California Supreme Court's Opinion.

We deal here with pages 19-24 of the Petition, although as shown above they need not be reached by the Court.

(a) The limited partnership's right to protect its good name (Petition p. 19) is not impaired one iota. The publication is, in fact and as the California Court ruled, not libelous.

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[8]Justice White's complaint was that *Gertz* "has federalized major aspects of libel law, by imposing federal constitutional limitations on liability. (418 U.S. 323, 370) Maple now seeks even further "federalization": it would have this court give its own reading to a publication which, under the applicable California Law, the California Supreme Court has held not to be defamatory. This would require this Court to be the ultimate arbiter of the meaning of all allegedly defamatory publications.

(b) Maple's hyperbolic language (e.g., "protecting calculating liars," "Hitler's rise to power") simply has no support in the record. In any event, defendants' right to petition the voters of Beverly Hills does not affect Maple's right to do the same. (Petition p. 20). In fact, the record contained the information that Maple had the support of the elected officials of Beverly Hills and had itself spent $44,500.00 in the elections here involved.

(c) The right to vote is concededly a fundamental right (Petition pp. 21-22) but that right and equitable apportionment have nothing to do with this case. The policing of arguments made by proponents of different points of view so that voters may not be "misled" would lead to a gross infringement of First Amendment rights and of the right to petition the government for redress of grievances.

(d) The California Supreme Court has not treated freedom of speech "as an absolute to the complete denial of all other precious rights," (Petition p. 23). This portion of the Petition is rhetoric unconnected with the issues in this case.

5. Maple's Argument That It Has Been Denied Due Process of Law Is Unavailable on This Petition and in Any Event Is Specious. (Re: Petition Part B, pp. 24-31).

Part B of Maple's petition argues that it has been denied due process. Maple itself concedes that no such argument was made below. ". . . the specific claim of a violation of due process was not contended below." (Petition, p. 7, footnote 10) The argument cannot be made here for the first time. *Cardinale v. Louisiana*, (1969) 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1162. *Stembridge v. Georgia*, (1952) 343 U.S. 541, 547, 96 L.Ed. 1130, 72 S.Ct. 834.

But in any event, the argument is specious. Maple has had a full hearing, the decision by the California Supreme Court carefully considered the law and properly holds that the three publications will not support an action for defamation. The denial of leave to amend under state law is not a denial of due process. It cannot be made so by petitioner's hyperbole.

CONCLUSION.

This is a classic case of a loser of an election seeking recourse to the judicial process. As Justice Mosk stated for the three members of the California Supreme Court who would have also denied Maple leave to amend the slander counts of this misguided complaint, "We should discourage attempts to recover through the judicial process what has been lost in the political process." (29 Cal.3d at 461, Appendix p. 23).

The petition should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAPLE PROPERTIES,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

(BETTY H. HARRIS, JOANN RUDEN, AND ERWIN OKUN,

Real Parties in Interest.)

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI; AND APPENDIX

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Petitioner Maple Properties ("Maple") submits this Reply Brief in support of its Petition for a Writ of Certiorari to the Supreme Court of the State of California ("Petition").

INTRODUCTION

> "Ninety-nine percent of the content of the publications is critical of actions of the governing body of Beverly Hills and cannot support an action of defamation." (Real Parties in Interest Brief in Opposition to Petition for Writ of Certiorari ("Opposition Brief"), p. 3, n. 3.)

In making this statement, Real Parties in Interest Betty H. Harris ("Harris"), Joann Ruden ("Ruden"), and Erwin Okun ("Okun") (collectively, the "defendants"), apparently concede that at least one percent of the three writings, which form the basis for Maple's three causes of action for libel in its First Amended Complaint, is actionable defamation. This concession draws into focus the vital federal issue in this case—whether calculated lies, when made during a municipal ballot campaign, are actionable defamation despite First Amendment considerations. In particular, Maple asks this Court to consider (1) whether defendants' speech interests, in light of their defamatory statements, were improperly accorded determinative weight over other constitutionally protected rights, and (2) whether the California Supreme Court denied Maple due process of law under the Fourteenth Amendment in refusing it leave to amend causes of action based upon the alleged defamatory writings.

The procedural pitfalls suggested by defendants in their Opposition Brief lack merit. This Court is empowered to review the opinion and orders of the

California Supreme Court in this case; Maple properly raised the federal issues here in the California state courts; and the California Supreme Court necessarily decided the federal issues here.

In the first question before this Court, a critical balancing of competing constitutional interests is at stake. Regarding the second question, Maple attaches as an Appendix hereto[1] a key analysis of the *Times* Letter (the publication upon which Maple bases its second cause of action) demonstrating its falsity and the fact that the California Supreme Court, in denying Maple leave to amend, deprived it of due process of law. Maple submits that nonactionable opinion may not be predicated upon knowingly false facts.

ARGUMENT

1. The Opinion And Orders Of The California Supreme Court Are Reviewable By This Court.

In their Opposition Brief, defendants argue that this Court does not have jurisdiction to review the opinion and orders of the California Supreme Court because no final judgment has been rendered in this case. In support of this contention, defendants cite two cases decided over fifty-seven years ago, *Collins v. Miller*, 252 U.S. 364, 40 S.Ct. 347, 64 L.Ed. 616 (1920); and *Arnold v. United States*, 263 U.S. 427, 44 S.Ct. 144, 68 L.Ed. 371 (1923).

Those cases, which did not involve demurrer rulings, were decided before this Court commenced its evolution of the finality requirement. More recently, this Court has recognized that the finality requirement is to be given a "practical rather than a

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[1] *See* notes 4 and 5 *infra* and accompanying text.

technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Further, while a state's law is factored by this Court in determining finality, "[t]he designation given the judgment by state practice is not controlling. [Citation omitted.]" *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72, 67 S.Ct. 156, 158, 91 L.Ed. 80 (1946); *Cole v. Violette*, 319 U.S. 581, 582, 63 S.Ct. 1204, 1205, 87 L.Ed. 1599 (1943), *reh. den.* 320 U.S. 810, 64 S.Ct. 28, 88 L.Ed. 489.

In fact, this case presents one of the established instances in which this Court has reviewed the decision of the highest court of a state where further proceedings are contemplated. In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477-85, 95 S.Ct. 1029, 1037-41, 43 L.Ed.2d 328 (1975), this Court recognized four situations where it will review decisions of the highest court of a state, although there may be further proceedings in the lower state courts. In the second enumerated exception to the final judgment rule set forth in *Cox Broadcasting*, this Court announced it has jurisdiction to review cases in which the federal issue, finally decided by the state's highest court, would survive and require this Court's review regardless of the subsequent lower state court proceedings. *Cox Broadcasting Corporation v. Cohn, supra*, at 479-81, 95 S.Ct. at 1038-39; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In its opinion, the California Supreme Court ordered that demurrers be sustained, without leave to amend, to the second, third, and fifth causes of action of Maple's First Amended Complaint. The California Supreme Court also ordered that demurrers be sus-

tained, with leave to amend, to the sixth cause of action of the First Amended Complaint. *See* Appendix to Petition, p. 22.

Thus, there remain two causes of action in the First Amended Complaint, one for slander (fourth cause of action)[2] and one for conspiracy to slander (sixth cause of action). In connection with these two remaining causes of action, the Los Angeles County Superior Court is bound by the opinion of the California Supreme Court in *Okun v. Superior Court*, 29 Cal.3d 442, 629 P.2d 1369, 175 Cal.Rptr. 157 (1981), insofar as the latter court ruled that defendants' First Amendment rights prevailed over other fundamental constitutional interests. Therefore, the first federal issue presented by Maple in its Petition would survive the lower court proceedings.

Certainly the second federal issue raised by Maple, *viz.*, that the California Supreme Court denied Maple due process of law in ordering demurrers to the second, third, and fifth causes of action sustained without leave to amend, survives any further proceedings in the Los Angeles County Superior Court on the two remaining causes of action.

In sum, even though the opinion and orders of the California Supreme Court do not constitute a final judgment, this Court has jurisdiction to review those rulings.

2. Maple Has Properly Raised In The State Courts The Federal Issues Presented Here.

Defendants correctly quote from 28 U.S.C. § 1257(3) that a petition for writ of certiorari must be based

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[2] In his April 24, 1980 Minute Order, Judge Foster ordered off calendar defendants' demurrers to this cause of action. *See* Appendix to Petition, p. 31.

upon a "title, right, privilege or immunity [which] is specially set up or claimed under the Constitution . . ." However, defendants incorrectly claim that this statute requires that a petitioner who is requesting a writ of certiorari must be seeking relief under the Constitution, a federal statute, or a treaty.

28 U.S.C. § 1257(3) mandates that any federal issue be raised at the proper time in the state courts. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928). Defendants' argument that relief may be based only on the Constitution or federal statutes is erroneous: one cannot sue upon the First Amendment. If defendants' contention were the law, then such defamation cases as *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), would not have been properly before this Court.

It is highly ironic that defendants have cited *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956), *reh. den.* 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69, in support of their position that Maple has not specially claimed a constitutional right here. In that case, arising during the McCarthy era, this Court found that since the California Supreme Court had ruled solely on state grounds in finding that Communist party affiliation constituted "just cause" for an employee's discharge under a collective bargaining agreement, no substantial federal question was presented. The case is notable for its vigorous dissent by Justice Douglas, joined by Justice Black and Chief Justice Warren, who argued that the California Supreme Court's decision rested squarely and directly under the First and Fourteenth Amendments. 351 U.S. at 300-04; 76 S.Ct. at 828-31. Maple

submits that this Court would not rule today as the majority of this Court did in 1956.

Maple presented its first federal issue to the California trial court and California Supreme Court. *See* Petition, pp. 4, 6, 7. Maple's explanation of its presentation of the second federal issue is found at Petition, pp.6-7, and at p. 9, *infra*, of this Brief.

3. The California Supreme Court Necessarily Decided The Federal Issues Presented Here.

In their Opposition Brief, defendants claim that the California Supreme Court decided this case solely on state grounds. Defendants are clearly in error. The California Supreme Court necessarily weighed defendants' First Amendment speech interests against Maple's right of personhood and the rights to vote and petition government. Where a calculated falsehood is published in the context of a municipal ballot campaign, various competing constitutional interests must be weighed, and that is precisely what the California Supreme Court did in this case. *See* Appendix, p. 8.

California defamation law is dependent upon federal constitutional principles. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 370, 94 S.Ct. at 3022 (White, J., dissenting); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977). Thus, where the California Supreme Court weighed constitutional considerations at the same time that it scrutinized California defamation law, that Court necessarily decided federal issues. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. at 67, 49 S.Ct. at 63. "[W]here the non-Federal ground is so interwoven with the other as not to be an independent matter, . . . our jurisdiction is plain."

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164, 37 S.Ct. 318, 321, 61 L.Ed. 644 (1917).

Defendants also claim that *Gertz* "is clearly based upon the premise that it is for the individual states, and not the federal courts, to determine their own substantive law of defamation . . ." (Opposition Brief, p. 7.) Defendants have confused their premises with their conclusions. *Gertz* holds that, *within certain constitutional limitations*, states are to fashion their own defamation laws. The federal issue element is as pronounced and vital here as it is in *Gertz*.

Defendants cite the following four cases which they claim mandate the conclusion reached here by the California Supreme Court: *Gertz v. Robert Welch, Inc., supra; New York Times Co. v. Sullivan, supra; Garrison v. State of Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); and *Greenbelt Cooperative Pub. Assn v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). Yet none of these cases involve the calculated falsehoods which defendants have perpetrated here. In fact, these four cases compel that this Court should grant Maple's Petition, since they all analyze state defamation laws within the context of constitutional principles.

Finally, defendants posit that since the California constitutional free speech provision[3] is arguably broader than First Amendment protection, the California Supreme Court need not have relied upon the First Amendment in ruling in this case. Regardless of what the California Supreme Court *might* have done, this Court does not have to indulge in hypotheticals. The fact that a state law "may have been called into

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[3] California Constitution, Art. I, Section 2.

play" by the California Supreme Court does not present an adequate state ground foreclosing this Court's jurisdiction. *Ivanhoe Irrigation District v. McCracken*, 375 U.S. 275, 290, 78 S.Ct. 1174, 1183, 2 L.Ed.2d 1313 (1958), *reh. den.* 358 U.S. 805, 79 S.Ct. 10, 3 L.Ed.2d 94; *Zacchini v. Scripps-Howard Broadcasting Co., supra.* Moreover, defendants totally ignore the other constitutional principles which are at stake here.

4. Defendants Have Summarily Dismissed The Vital Constitutional Rights At Issue.

With a wave of the hand, defendants dismiss the conflicting constitutional issues here as being mere "rhetoric". (Opposition Brief, p. 8.) Defendants raised no points for which response is necessary here, and Maple will continue to rely on the arguments made in its Petition, pp. 19-24.

5. The California Supreme Court's Refusal To Grant Maple Leave To Amend Constitutes A Denial Of Due Process Of Law.

By denying Maple the opportunity to amend its First Amended Complaint to set forth additional facts brought to the Court's attention, the California Supreme Court deprived Maple of due process of law under the Fourteenth Amendment. *See* Petition, pp. 24-31. As further evidence that the California Supreme Court did not have before it all of the circumstances surrounding the publication of defendants' defamatory statements, Maple requested that that Court take judicial notice of a pleading,[4] which was filed in

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[4] Application of Maple Properties for Leave to File Request To Take Judicial Notice And Request To Take Judicial Notice In Order to Answer Questions Raised At Oral Argument, filed on April 16, 1981, in California Supreme Court Case Nos. L.A. 31341 and L.A. 31342.

another California Supreme Court case, setting forth in detail the falsity of the *Times* Letter (second cause of action in Maple's First Amended Complaint). Due to the importance of that pleading, and especially in light of defendants' erroneous claim that the charge of conflict of interest was true,[5] Maple attaches as an Appendix relevant portions of the judicial notice request it filed with the California Supreme Court.

This second federal issue, the denial by the California Supreme Court of due process of law, was presented to the California Supreme Court. *See* Petition, pp. 6-7. Since the Los Angeles County Superior Court had overruled defendants' demurrers to the second, third, fifth, and sixth causes of action, there was no need to present the due process argument before that Court. This issue was presented below in a manner sufficient for this Court to review it. *See Street v. New York*, 394 U.S. 576, 584-85, 89 S.Ct. 1354, 1361-62, 22 L.Ed.2d 572 (1969); *New York ex rel. Bryant v. Zimmerman, supra.* The Fourteenth Amendment due process question was presented as explained in the Petition, pp. 6-7, and also was specifically presented in a formal letter dated April 12, 1981 to California Supreme Court Chief Justice Bird in California Supreme Court Case Nos. L.A. 31341 and L.A. 31342. *See* Appendix, p. 9, n. 2.

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[5] Opposition Brief, p. 3, n.3.

CONCLUSION

For all the reasons set forth here and in its Petition, Maple requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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November, 1981

No. 81-719

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APPENDIX

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LA 31342

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IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

ERWIN OKUN, *Petitioner,* *vs.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31341
BETTY H. HARRIS, JOANN RUDEN, *Petitioners,* *vs.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31342

APPLICATION OF MAPLE PROPERTIES FOR LEAVE TO FILE REQUEST TO TAKE JUDICIAL NOTICE AND REQUEST TO TAKE JUDICIAL NOTICE IN ORDER TO ANSWER QUESTIONS RAISED AT ORAL ARGUMENT

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LA 31342

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

ERWIN OKUN, *Petitioner,* *vs.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31341
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APPLICATION OF MAPLE PROPERTIES FOR LEAVE TO FILE REQUEST TO TAKE JUDICIAL NOTICE

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest Maple Properties ("Maple"), through its counsel of record, hereby respectfully applies for leave to file the attached Request To Take Judicial Notice of a pleading being filed today in this Court in a separate but related case *now pending before this Court*, entitled "Betty H. Harris, Petitioner, v. Superior Court, Respondent; Richard A. Stone, Real Party in Interest" (Case No. 2nd Civil No. 61513).* If this Court takes judicial notice of the attached pleading, its contents will demonstrate the *many material misstatements of fact* in the *Times* Letter authored by Petitioner Betty H. Harris.

This application is made because at oral argument, several Justices requested that Maple's counsel identify false statements of fact in the *Times* Letter authored by Petitioner Harris, and Maple's counsel failed to do so. This inadvertent error will be corrected, and the Court will have the correct responses to important inquiries it raised at oral argument, if this application is granted and the Court takes judicial notice of the attached pleading.

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*N.B.: For the convenience of the United States Supreme Court, only the relevant portion of the pleading mentioned in the text is reprinted in this Appendix.

Maple therefore requests that this Court allow it to file the attached Request To Take Judicial Notice.

DATED: April 15, 1981

Respectfully Submitted,

LEVY & NORMINTON
A Professional Law Corporation

By S/Charles M. Levy
Charles M. Levy
Attorneys for Real Party in Interest Maple Properties

Case Nos. LA 31341
LA 31342

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

ERWIN OKUN, *Petitioner,* *vs.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31341
BETTY H. HARRIS, JOANN RUDEN, *Petitioners,* *vs.* THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent;* MAPLE PROPERTIES, A LIMITED PARTNERSHIP, *Real Party in Interest.*	L.A. 31342

REQUEST TO TAKE JUDICIAL NOTICE IN ORDER TO ANSWER QUESTIONS RAISED AT ORAL ARGUMENT

At oral argument, on April 6, 1981, this Court asked counsel for Real Party in Interest Maple Properties ("Maple") to indicate what portions of the *Times* Letter authored by Petitioner Betty H. Harris ("Harris") are false. Inadvertently, several of Maple's counsels' answers were either inadequate or incorrect.

So that the Court will have the correct information it sought at oral argument, Maple requests that this Court take judicial notice[1] of a pleading being filed today in a related case now pending before this Court.** That case is entitled "Betty H. Harris, Petitioner, v. Superior Court, Respondent; Richard A. Stone, Real Party in Interest" and designated as Action No. 2nd Civil No. 61513 on the docket of this Court. In that action, former Beverly Hills Mayor Richard Stone seeks, among other things, damages for libel based on the same *Times* Letter that is the subject of this discussion and the inquiries raised at oral argument. The Stone case has been brought before this Court on the question of whether Harris can be forced to disclose the names of citizens (assuming they exist — which is a debatable point at best) who allegedly suspected the Beverly Hills City Council's motives in abandoning its water wells. A copy of the pleading of which Maple requests the Court to take judicial notice, entitled "Response to Petition for Hearing", is attached hereto marked Exhibit "A".

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[1] Evidence Code Section 452(d).

**See note *, *supra*.

Judicial notice and examination of attached pleading will provide the Court with an itemization of the *many material false statements* in the *Times* Letter which Harris authored, *including* the following:

1. The City Council's decision to abandon the City water wells occurred on December 16, 1975, not a year later, in December, 1976, as Harris states in the *Times* Letter.

2. On December 16, 1975, the date the City Council voted four to one to abandon the City water wells and dispose of the underlying land, Richard Stone did not represent David Rowen or any developer associated with David Rowen, barely knew David Rowen and had had no prior legal or business dealings of any kind with him. Contrary to the impression Harris creates, it was not until more than one year later that Stone first rendered any legal services for Rowen with respect to the Beverly Hills industrial area.

3. For seven years prior to December 16, 1975, the City's water supply had been the subject of many studies and City Council debates. Stone, who was a councilman during the entire period of time, had always adamantly and consistently opposed the City's producing its own water and had consistently and vocally advocated abandoning the wells. Harris heard Stone express these views many times over the seven years the matter was studied and debated. Harris attended most, if not all, of the City Council meetings at which Stone spoke. And, Stone expressed these very same views to Harris during many private conversations over the seven-year period preceding the vote on December 16, 1975. Thus, Harris was well aware, when she set out to "set the record straight" (her own words), that Stone's position had nothing to do with David Rowen (whom he did not represent) or

Maple (which did not even come into existence until one and three-quarters years after the decision had been made to abandon the water wells).

4. On December 16, 1975, the City was already totally dependent on the Metropolitan Water District because the Metropolitan Water District was then supplying 90% of the City's water! Only the remaining balance of 10% came from City wells. During the years immediately preceding 1975, the City had obtained no less than 65% of its water from the Metropolitan Water District and the balance from the City wells. Harris falsely leads her readers to conclude that the City was self-sufficient in its water needs and obtained all of its water from local wells before the decision had been made to abandon the water wells.

5. Contrary to Harris' statement, Metropolitan Water District water was less expensive than City produced water.

6. The plant site the City swapped with Maple was one of two water treatment plants in Beverly Hills and was the older and smaller of the two. Most, and perhaps all, of the City's water studies concluded that even if the City were to continue to produce a portion of its own water, this plant should still be abandoned. Harris would have her readers believe Stone orchestrated the abandonment of the wells to make this site available for exchange with Maple.

WHEREFORE, Maple requests this Court take judicial notice of the pleading attached hereto marked Exhibit "A".[2]

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[2] A similar, but less formal request, was contained in an April 12, 1981 letter from Maple's counsel to this Court.

DATED: April 15, 1981

Respectfully submitted,

LEVY & NORMINTON
A Professional Law Corporation

By S/Charles M. Levy
Charles M. Levy
Attorneys for Real Party in
Interest Maple Properties

EXHIBIT "A"

COMPARISON OF THE TIMES LETTER WITH THE TRUTH

Title of Newspaper Column: "SETTING THE RECORD STRAIGHT"

Letter: "The article regarding a controversial land swap between the Beverly Hills City Council and a developer of luxury condominiums ("Land Swap Stirs Up Beverly Hills" by Sam Kaplan, Dec. 26) missed the point entirely."

Comment: Defendant Harris was quoted in the Sam Kaplan December 26, 1978 Los Angeles Times article. Thus, Kaplan wrote:

> "In a long, rambling interview, Harris related how the Council a few years ago, over the protests of the League, capped and sold the City's water wells. This made the water treatment plant in the industrial area surplus.
>
> " 'The plant is one of the parcels the City swapped with Maple,' notes Harris with an arched brow. She suggests the sale of the wells was orchestrated by Stone simply to make the plant and parcel expendable, setting up the swap with Maple."

Note that Harris charged that City Councilman Stone arranged the sale of City water wells which, in turn, made the water

treatment plant obsolete so that the land on which the treatment plant was located could be traded to Maple.

As will be demonstrated below (where Harris repeats the same allegations as part of her February 28, 1979 letter), the charge is totally FALSE.

Letter: "To set the record straight:"

Comment: Harris is not about to express an opinion. She is about to set forth facts.

Letter: "While the area in contention — adjacent to Beverly Hill's civic center — is known as the industrial area, it also houses the city's vital municipal services facilities. It is the site of the city's refuse transfer station, vehicle maintenance garages and all the other indispensable operations that make a city function. It is also the site of a water treatment plant that the City Council abandoned in 1976." (Emphasis added.)

Comment: The last sentence is FALSE.

On December 16, 1975 (not 1976), the Beverly Hills City Council enacted Resolution No. 75-R-5373 entitled "Resolution of the Council of the City of Beverly Hills Establishing the Policy of the City Relating to its Municipal Water Supply," which specified, in Section 1, that the "City shall purchase its entire supply of water for municipal purposes from the Metropolitan Water District of Southern California, as needed, for distribution to the present and future customers of its municipal water

system." As a result, Section 4 of the Resolution provides that "the City shall dispose of or convert to other City uses all surplus or excess real or personal property which may result from the implementation of the water policy adopted by this Resolution."

The importance of the December 16, 1975 date — the day the City enacted the Resolution that made the water treatment plant obsolete — is that Stone was not representing Rowen, and, in fact, hardly knew him, at that time.

Letter: "This action was followed by the Council's abandoning the City's own water wells in the midst of the recent drought."

Comment: We believe this statement is FALSE.

We are presently checking water precipitation statistics to determine the dates and severity of the drought. Specifically, we do *not* believe that the City was in the midst of a drought at the time referred to. Furthermore, all the existing wells were silted and of little or no value. If the City had decided not to purchase its entire supply of water from the Metropolitan Water District, it would have been necessary to abandon most, if not all, of the existing wells and drill new wells.

Letter: "It was this incredible move that caused a number of citizens to become suspicious of the Council's motives."

Comment: We believe this statement is FALSE.

In 1975, when the water supply decision was made, no citizens voiced any suspicions with respect to the Council's motives. There was disagreement over whether the City should purchase its entire supply from the Metropolitan Water District but that disagreement arose because some local citizens felt that the City ought to continue its own source of supply (which, as will be pointed out later, provided only a portion of the City's water needs) and other citizens — including a majority of the City Council — felt all water should be obtained from the MWD.

We believe that there were no citizens who became suspicious of the Council's motives and the statement that any such suspicious citizens existed is FALSE. It is for that reason we believe Harris is now seeking an order from this Court quashing a discovery order that she reveal the names of these suspicious citizens. If no such citizens exist, there is no one whose name she can disclose.

Letter: "Beverly Hills residents were thus forced to become completely dependent upon one very expensive source of water, that supplied by the Metropolitan Water District of Southern California."

Comment: This statement is FALSE.

Even prior to the time the December 16, 1975 resolution was adopted, the City was dependent upon the Metropolitan Water District for at least two-thirds of its water supply. (See Minutes, Regular Coun-

cil Meeting, City of Beverly Hills, December 16, 1975 re Resolution 5, p.3:

> "Mayor Slaff explained that the water wells do not yield more than one-third of the City's water and do not justify the tremendous expenditure required to utilize this amount."

The history of Beverly Hills water requirements from MWD over the thirty five years prior to 1975 were as follows:

Year	MWD Percentage of Supply
1941	43.3%
1949	29%
1950	5.2%
1955	14%
1960	27%
1965	52%
1970	61%
1975	90%

Prior to December 16, 1975, the City would not have functioned without the MWD water. What city could function if it lost two-thirds of its water supply? The City had been dependent on the MWD for over 10 years prior to December 16, 1975.

Furthermore, the statement that the Metropolitan Water District was a "very expensive source of water" is also FALSE. It cost the City substantially more to produce its water than to purchase water from the Metropolitan Water District. In 1975 the City was faced with purchasing its water

for the next year from the MWD at $81 an acre-foot or producing it from the City's own wells at a cost of $129 an acre-foot. City-produced water was always more expensive than MWD-supplied water. One former City official has estimated that had the City retained the wells, it would have cost the City approximately $125 to produce one acre foot of water that it was purchasing from the Metropolitan Water District for $40.

Letter: "Even the MWD's general manager advised the city against this decision."

"Nevertheless, this was done despite the fact that in 1974 the voters of Beverly Hills had passed, by a two-thirds majority, a $3.75 million land [sic] issue to refurbish the city's water wells and treatment facilities. The only Council member opposed to the bond issue and retention of the city's wells was Richard Stone, an attorney."

Comment: Stone was first elected to the Beverly Hills City Council in 1968 and served continuously until 1980. For years, Harris attended most, if not all, of the many City Council meetings at which water was discussed prior to the December 16, 1975 Resolution. (According to the December 16, 1975 Resolution for seven years prior to 1975 the City had caused numerous studies and reports to be rendered to define the best plan for a City water supply.) At both these meetings and in many private conversations with Harris prior to December 16, 1975, Stone reiterated his continued and unswerving opposition to retention of the City's water

wells and water treatment plants. Thus, Harris was well aware of Stone's years-long and total opposition to City owned or operated water production and treatment facilities. His opposition was based on excessive cost and deficient quality of the well water.

Letter: "Mysteriously, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were $5 million short."

Comment: The statement is partially FALSE.

It is true that an independent outside consultant, Koebig & Koebig, had estimated it would cost $3.75 million dollars to restore the City's water wells and treatment facilities. City staff members reviewed the figures and found errors by the outside consultant.

The facts of Koebig & Koebig's report and the discovery by City staff of the errors were all well publicized. There was no mystery, whatsoever, with respect to the matter. Harris was especially cognizant of the fact a mystery did not exist because of her attendance at City Council meetings where water, the Koebig & Koebig report, and the errors in the Koebig & Koebig report were discussed. Further, Harris was in weekly, if not daily, communication with the City Manager and the head of the City Water Department regarding this matter.

Letter: "Amazingly, a year later the claim went up to $12 million more than the voter-approved bonds."

Comment: We are completing our investigation into this matter. We do know that new consultants were hired and that their analysis indicated the cost would be substantially more.

Letter: "But, without asking the voters again, in December, 1976, the Council closed down the wells and sold off the land on which they were located."

Comment: The statement is **FALSE**.

As indicated above, the Resolution to dispose of surplus real estate resulting from the implementation of the new water policy was enacted December 16, 1975, one year earlier than the date Harris indicated both in this paragraph and in the third paragraph of her letter as the date the Council determined to dispose of the land underlying the water treatment plant (and the water wells).

Letter: "Not until April 12, 1977, did Richard Stone, at that time the mayor of Beverly Hills, reveal that David Rowen, representing a developer, had become a client of Stone's."

Comment: It now becomes apparent why Harris has misstated, by one year, the date of the City Council's decision to purchase its entire supply of water from the MWD and dispose of surplus real property resulting from the implementation of that water policy. By

selecting a date in 1976, and indicating that date was December 1976, a full year after the fact, Harris can mislead the public into believing that Councilman Stone had acted as attorney for David Rowen at the time the City made its final decision regard ng water. In fact, the following is true:

1. Neither on December 16, 1975 nor at any time prior thereto, had Richard Stone acted as an attorney for David Rowen or any business entity with which David Rowen was associated.

2. Neither on December 16, 1975 nor at any time prior thereto had there been any business dealings between Richard Stone and David Rowen.

3. On December 16, 1975, and prior thereto, David Rowen and Richard Stone knew each other only casually and had only met each other on social occasions at parties in other peoples' homes.

4. On December 16, 1975 David Rowen was not even involved in the real estate business. He was either brokering loans or dealing in precious metals or coins.

The actual facts of Richard Stone's representation of David Rowen and Maple Properties are as follows:

1. The first legal services Richard Stone rendered for David Rowen or an entity with which Rowen was associated commenced in March or April 1976,

months after the passage of the water policy Resolution. At that time, Stone's representation dealt with the purchase of the real property belonging to the Will Rogers Estate located on the corner of Beverly Drive and Dayton Way in Beverly Hills. This property has nothing to do with the Beverly Hills industrial area or the dispute.

2. Stone first began representation of Rowen with respect to Beverly Hills industrial area property in January of 1977, more than one year after the decision to abandon the water wells and treatment facilities.

3. From January of 1977 until April 12, 1977, when Stone publicly announced his representation of Rowen, no matter regarding the Beverly Hills industrial area came before the Beverly Hills City Council for determination.

4. Maple Properties, a limited partnership, was formed, and came into existence, on October 26, 1977.

Letter: "The abandoned treatment plant is now earmarked for the developers in a land swap deal."

Comment: Again, Harris seeks to mislead the public into believing that the "sale of the wells was orchestrated by Stone simply to make the plant and parcel expendable, setting up the swap with Maple." (See first comment above.)

Furthermore, nowhere does Harris reveal that the City had two water treatment facilities —one in the Industrial Area and the other at the corner of La Cienega and Olympic Boulevards. The Industrial Area treatment facility was older and smaller. Most, if not all, of the proposals to modernize the City's water treatment facilities had provided that the Industrial Area facility should be abandoned. Thus, even if the City had continued producing water from its own wells, the treatment plant to which Harris makes reference would have been abandoned.